IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America,)
)
v.) Case No.: 1:25-CR-00272-MSN
)
James B. Comey, Jr.,)
)
Defendant.)

JAMES B. COMEY, JR.'S MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT

James B. Comey, Jr., by and through undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 12(b), moves this Court to dismiss the government's indictment. As explained further below, the government has singled out Mr. Comey for prosecution because of his protected speech and because of President Trump's personal animus toward Mr. Comey. Such a vindictive and selective prosecution violates the First Amendment, Due Process Clause, and equal protection principles. The proper remedy for this unconstitutional prosecution is dismissal with prejudice. Any lesser remedy would be insufficient in light of the government's flagrant misconduct and the need to deter the government from bringing further unconstitutional prosecutions.

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INTRODUCTION

The indictment in this case arises from multiple glaring constitutional violations and an egregious abuse of power by the federal government. The United States Constitution entitles individuals to speak out against the government and, in turn, forbids the government from retaliating against individuals for their protected speech. And bedrock principles of due process and equal protection have long ensured that government officials may not use courts to punish and imprison their perceived personal and political enemies. But that is exactly what happened here.

President Trump ordered the Department of Justice (DOJ) to prosecute Mr. Comey because of personal spite and because Mr. Comey has frequently criticized the President for his conduct in office. When no career prosecutor would carry out those orders, the President publicly forced the interim U.S. Attorney to resign and directed the Attorney General to effectuate "justice" against Mr. Comey. He then installed a White House aide with no prosecutorial experience as interim U.S. Attorney. The President's new hand-picked interim U.S. Attorney indicted Mr. Comey just days later—and days before the relevant statute of limitations was set to expire.

Defendant James B. Comey, Jr., submits this motion to dismiss under Federal Rule of Criminal Procedure 12(b)(3)(A) because the government's conduct in this case violates two settled and surpassingly important legal doctrines. First, the government instigated a vindictive prosecution based on Mr. Comey's protected speech, in violation of the Due Process Clause and First Amendment. Second, the government engaged in selective prosecution, in violation of equal protection principles. Dismissal of federal criminal charges under these doctrines has been rare. That is because for decades the DOJ has maintained the highest standard of ethics, following only the facts and the law to determine whether to bring criminal charges. This case marks a sharp departure from that tradition. Ample objective evidence—much of which comes directly from government officials' own public statements and admissions—establishes that the government's animus toward Mr. Comey led directly to this vindictive and selective prosecution.

The proper remedy for the government's constitutional violations is a dismissal with prejudice. That is the only way to cure the government's flagrant misconduct and to deter similar future prosecutions of perceived political opponents.

CONCLUSION

For the foregoing reasons, the indictment should be dismissed with prejudice. Alternatively, the Court should order discovery and conduct a hearing on vindictive and selective prosecution.

Dated: October 20, 2025

Respectfully submitted,

JAMES B. COMEY, JR.
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of October, 2025, a true copy of the foregoing document was filed electronically through the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jessica N. Carmichael
Jessica N. Carmichael

Counsel for Defendant James B. Comey, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,

v.

JAMES B. COMEY, JR.,

Defendant.

Criminal No. 1:25-cr-272-MSN

ORDER

This matter comes before the Court on the government's Motion for Implementation of Filter Protocol. ECF 38.

On October 13, 2025, the government filed the instant motion, seeking entry of a filter protocol to govern review of electronic evidence "obtained from an attorney" for potentially privileged material acquired through "judicial warrants in a previous government investigation." ECF 38 at 1–2. Defendant filed his opposition to the government's motion on October 27, 2025, in which he raised various objections to the proposed filter protocol and asked this Court to deny the government's motion without prejudice. ECF 71. Defendant further asked the Court to "direct the government to disclose" five categories of information "to allow both the Court and the defense to assess the appropriateness of the protocol[.]" *Id.* at 12.

This Court assesses the appropriate contours of a privilege filter protocol according to the guidelines set forth in *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019), *as amended* (Oct. 31, 2019). In *In re Search Warrant*, a Baltimore law firm challenged the government's use of a Department of Justice filter team to inspect attorney-client privileged materials seized from that firm. *Id.* at 164. The Fourth Circuit reversed the district court's denial of the law firm's motion to enjoin the filter team's review of the seized material. Relevant to this case, the Fourth Circuit held that "a court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute." *Id.* at 176. The Fourth Circuit observed that, "[i]n addition to the separation of powers issues" that might arise, allowing members of the executive to conduct the filter, even if those members were trained lawyers, raised the possibility that "errors in privilege determinations" would result in "transmitting seized material to an investigation or prosecution team." *Id.* at 177. It thus determined that the filter protocol "improperly delegated judicial functions to the Filter Team," and that instead, "the magistrate judge (or an appointed special master) — rather than the Filter Team — must perform the privilege review of the seized materials[.]" *Id.* at 178, 181 (collecting cases). The Fourth Circuit further concluded that adversarial proceedings before the magistrate judge were needed prior to the authorization of a filter team and protocol. *Id.* at 179.

Similarly here, briefing on the government's proposed filter protocol raises several legal questions that must be resolved before any protocol is authorized. These questions include, but are not limited to, whether the original warrants authorizing the seizure of the materials at issue are stale, whether those warrants authorize the seizure and review of these materials for the crimes at issue in this case, whether the lead case agents or prosecution team in this case have been exposed to privileged materials, and what the proper procedures are, if any, for review of the materials at issue. *See* ECF 71 at 1, 5, 6, 8–10, 12.

Accordingly, it is hereby

ORDERED that Magistrate Judge William E. Fitzpatrick is hereby appointed to preside over all proceedings related to the potential review of privileged materials in this case in accordance with the guidance provided in *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019), *as amended* (Oct. 31, 2019) and directed to promptly schedule a hearing to address these matters.

The Clerk of Court is directed to forward a copy of this Order to counsel of record.

IT IS SO ORDERED.

/s/
Michael S. Nachmanoff
United States District Judge

October 29, 2025
Alexandria, Virginia

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,

v.

JAMES B. COMEY, JR.,

Defendant.

Criminal No. 1:25-cr-272-MSN

ORDER

This matter is before the Court pursuant to United States District Judge Michael S. Nachmanoff's Order dated October 29, 2025 (ECF 102) directing the undersigned to schedule a hearing to address the government's Motion for Implementation of Filter Protocol (ECF 38) and the Defendant's opposition thereto (ECF 71). Accordingly, it is hereby

ORDERED that a hearing on this issue shall be held on Wednesday, November 5, 2025, at 10:00 a.m. in Courtroom 500; and, given that the hearing may address information the government has designated as Protected Material under the Protective Order (ECF 40), it is further **ORDERED** that the parties shall file their positions as to whether all or part of the hearing should be closed to the public by Friday, October 31, 2025, at 5:00 p.m.

ENTERED this 30th day of October, 2025.

William E. Fitzpatrick
WILLIAM E. FITZPATRICK
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America,	)	
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JAMES B. COMEY JR.'S MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INDICTMENT

James B. Comey, Jr., by and through undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 12(b), moves this Court to dismiss the indictment. As explained in the accompanying Memorandum, Count One seeks to punish Mr. Comey for responding to Senator Ted Cruz's fundamentally ambiguous questions with literally true answers. As a matter of law, neither those questions nor those answers can serve as the basis for a violation of 18 U.S.C. § 1001(a)(2). Thus, under longstanding principles of criminal law, Count One must be dismissed. If Count Two rests on the same allegedly false statements, it should be dismissed for the same reasons. And in any event, Count Two should be dismissed because it fails to give Mr. Comey adequate notice of the charges against him.

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INTRODUCTION

Count One of the indictment seeks to punish Mr. Comey for seconds of testimony he gave in response to compound and ambiguous questioning. But longstanding principles of criminal law make clear that the government cannot prove a violation of 18 U.S.C. § 1001(a)(2) unless it establishes that the defendant gave false answers to precise questions. Here, the indictment conspicuously omits the lengthy, confusing questions that prompted Mr. Comey's testimony. Specifically, after speaking for more than a minute, Senator Ted Cruz asked Mr. Comey to recall statements he had made three years earlier and to simultaneously address statements that Senator Cruz incorrectly claimed were made by Andrew McCabe, the former Deputy Director of the Federal Bureau of Investigation (FBI). In doing so, Senator Cruz never indicated that he wanted Mr. Comey to address the statements or activities of any person except for Mr. McCabe. Viewed in context, Senator Cruz's questions cannot form the basis for a violation of Section 1001(a)(2) because they were fundamentally ambiguous. And, regardless, Mr. Comey's answers to them were literally true. Count One thus must be dismissed under Federal Rule of Criminal Procedure 12(b)(3)(A). Count Two should be dismissed for the same reason to the extent it rests on those same alleged false statements, and for the independent reason that it deprives Mr. Comey of his right to notice of the charge against him.

BACKGROUND

From September 4, 2013, to May 9, 2017, Mr. Comey served as Director of the Federal Bureau of Investigation (FBI). As FBI Director, Mr. Comey oversaw the FBI's operations, including investigations into national security threats and federal crimes involving terrorism, fraud, political corruption, gang violence, and cybercrimes. *See* 28 C.F.R. § 0.85. Among the many investigations at the FBI during Mr. Comey's tenure was "Crossfire Hurricane," a counterintelligence investigation into alleged links between President Trump's 2016 campaign and the Russian government, as well as "Midyear Exam," an investigation begun in 2015 into then-candidate Hillary Clinton's alleged mishandling of classified information during her tenure as Secretary of State.

On May 3, 2017, Mr. Comey voluntarily testified at the Senate Judiciary Committee's annual FBI oversight hearing. *See Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (May 3, 2017) (Statement of James B. Comey, Dir. FBI, at 44:00), http://bit.ly/3WdliN9. As relevant here, Mr. Comey engaged in the following exchange with Senator Charles Grassley:

> SEN. GRASSLEY: Director Comey, have you ever been an anonymous source in news reports about matters relating to the Trump investigation or the Clinton investigation?
>
> MR. COMEY: Never.
>
> SEN. GRASSLEY: Question two on [*sic*] relatively related, have you ever authorized someone else at the FBI to be an anonymous source in news reports about the Trump investigation or the Clinton investigation?
>
> MR. COMEY: No.

See Exhibit B to Mot. to Dismiss Indictment Based on Vindictive & Selective Prosecution, ECF No. 59-2 at 5 ("2017 Hearing Transcript").

Three years later, on September 30, 2020, Mr. Comey voluntarily appeared before the same committee at a hearing on the Crossfire Hurricane investigation. *See Oversight of the Crossfire Hurricane Investigation: Day 3*, *Hearing Before the Sen. Comm. on the Judiciary*, 116th Cong. (Sept. 30, 2020), http://bit.ly/4o2ekHb.[1] As relevant here, Mr. Comey engaged in the following exchange with Senator Ted Cruz:

> SEN. CRUZ: On May 3, 2017 in this committee, Chairman Grassley asked you point blank "have you ever been an anonymous source in news reports about matters relating to the Trump investigation or the Clinton investigation?" You responded under oath "never." He then asked you "have you ever authorized someone else at the FBI to be an anonymous source in news reports about the Trump investigation or the Clinton administration." You responded again under oath, "no."
>
> Now, as you know, Mr. McCabe, who works for you, has publicly and repeatedly stated that he leaked information to The Wall Street Journal and that you were directly aware of it and that you directly authorized it. Now, what Mr. McCabe is saying and what you testified to this committee cannot both be true; one or the other is false. Who's telling the truth?
>
> MR. COMEY: I can only speak to my testimony. I stand by what, the testimony you summarized that I gave in May of 2017.
>
> SEN. CRUZ: So, your testimony is you've never authorized anyone to leak. And Mr. McCabe when if he says contrary is not telling the truth, is that correct?
>
> MR. COMEY: Again, I'm not going to characterize Andy's testimony, but mine is the same today.

See Exhibit A ("Oversight Hearing Video Clip"); Exhibit C to Mot. to Dismiss Indictment Based on Vindictive & Selective Prosecution, ECF No. 59-3 at 11 ("Oversight Hearing Transcript").[2] The colloquy thus reflects that Senator Cruz's questions focused exclusively on an asserted contradiction between Mr. McCabe and Mr. Comey.[3]

Apparently based on that testimony, the government has charged Mr. Comey with a two-count indictment. Count One charges Mr. Comey with making false statements to Congress, in alleged violation of 18 U.S.C. § 1001(a)(2). *See* ECF No. 1 at 1. To prove that a defendant violated Section 1001(a)(2), the government must establish that (1) the defendant made a false statement to a governmental agency, (2) the defendant acted knowingly or willfully, and (3) the false statement was material to a matter within the jurisdiction of the agency. *United States v. Freitekh*, 114 F.4th 292, 310 (4th Cir. 2024). Here, the government attempts to satisfy those elements by alleging the following:

> On or about September 30, 2020, in the Eastern District of Virginia, the defendant, JAMES B. COMEY JR., did willfully and knowingly make a materially false, fictitious, and fraudulent statement in a matter within the jurisdiction of the legislative branch of the Government of the United States, by falsely stating to a U.S. Senator during a Senate Judiciary Committee hearing that he, JAMES B. COMEY JR., had not "authorized someone else at the FBI to be an anonymous source in news reports" regarding an FBI investigation concerning PERSON 1.
>
> That statement was false, because, as JAMES B. COMEY JR. then and there knew, he in fact had authorized PERSON 3 to serve as an anonymous source in news reports regarding an FBI investigation concerning PERSON 1.

ECF No. 1 at 1. On October 15, 2025, the government confirmed to the defense that "PERSON 1" refers to Hillary Clinton and "PERSON 3" refers to Daniel Richman. Additionally, although the indictment does not specifically reference Senator Cruz, Mr. Comey's exchange with Senator Cruz is the only part of the 2017 Senate hearing that touched on whether Mr. Comey had "authorized someone else at the FBI to be an anonymous source in news report." *See* Oversight Hearing Video Clip.

Count Two charges Mr. Comey with "corruptly endeavor[ing] to influence, obstruct and impede" a Senate Judiciary Committee investigation on or about the same date "by making false and misleading statements before that committee," in alleged violation of 18 U.S.C. § 1505. *Id.* at 2. The indictment does not specify which "false and misleading statements" Mr. Comey allegedly made, and why they were allegedly false or misleading. Similarly, the indictment does not specify how Mr. Comey allegedly "corruptly endeavor[ed] to influence, obstruct, and impede" the Committee's investigation, or even which investigation that was. *Id.*

ARGUMENT

Section 1001(a)(2) authorizes the government to prosecute witnesses who misled government investigators by giving materially false answers to clear questions. But it does not authorize the government to create confusion by posing an imprecise question and then seek to exploit that confusion by placing an after-the-fact nefarious interpretation on the ensuing benign answer. Indeed, basic due process principles in criminal law require that the questioner frame his questions with clarity so that a witness does not have to guess. "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Bronston v. United States*, 409 U.S. 352, 360 (1973) (citations omitted). Accordingly, "[p]recise questioning is imperative as a predicate for the offense of perjury." *Id.* at 362. And a perjury statute cannot be "invoked . . . so long as the witness speaks the literal truth." *Id.* at 360.[4]

Applying those principles here, Count One must be dismissed. Count One alleges that Mr. Comey made a false statement in response to Senator Cruz's questions at a 2020 Senate hearing. ECF No. 1 at 1. But those questions—which required Mr. Comey to recall statements he had made three years prior and simultaneously address another individual's alleged statements—were "fundamentally ambiguous" and thus cannot support a conviction under Section 1001(a)(2). *See United States v. Mosby*, 143 F.4th 264, 276 (4th Cir. 2025). Nor can Mr. Comey's "literally true answer[s]" to those questions support a conviction. *See United States v. Sarwari*, 669 F.3d 401, 406 (4th Cir. 2012). Fundamental to any false statement charge are both clear questions and false answers. Neither exists here.

In turn, Section 1505 authorizes the government to prosecute a witness who "corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes" a "pending proceeding" before a Congressional committee. 18 U.S.C. § 1505. As noted, Count Two alleges that Mr. Comey violated Section 1505 by making "false and misleading statements" to the Senate Judiciary Committee but fails to specify which statements were allegedly false and misleading. *See* ECF No. 1 at 2. To the extent Count Two rests on the same allegedly false statements as Count One, it should be dismissed for the same reasons. And in any event, Count Two should be dismissed because it fails to give Mr. Comey adequate notice of the charges against him. *See Russell v. United States*, 369 U.S. 749, 766 (1962).

I. COUNT ONE MUST BE DISMISSED BECAUSE IT RESTS ON A PARTICULAR INTERPRETATION OF FUNDAMENTALLY AMBIGUOUS QUESTIONS

An "answer to a fundamentally ambiguous question may not, as a matter of law, form the basis for a false statement" under Section 1001(a)(2). *Mosby*, 143 F.4th at 276 (citing *Sarwari*, 669 F.3d at 407). "The purpose of the rule of fundamental ambiguity is three-fold, namely, to (1) preclude convictions grounded on surmise or conjecture; (2) prevent witnesses from unfairly bearing the risks of inadequate examination; and (3) encourage witnesses to testify (or at least not discourage them from doing so)." *United States v. Farmer*, 137 F.3d 1265, 1269 (10th Cir. 1998). To achieve those goals, "[c]ourts have required near-absolute clarity from the questioner in order to support a perjury charge," and have similarly applied that requirement to analogous false-statements charges such as those here. *United States v. Strohm*, 671 F.3d 1173, 1178 (10th Cir. 2011) (citing Linda F. Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. Tol. L. Rev. 397, 403 (2003)); *see United States v. Elfenbein*, 144 F.4th 551, 567 n.14 (4th Cir. 2025) (explaining that "where the relevant language is fundamentally ambiguous," a "false-statement conviction is . . . impossible").

A false-statements charge that rests on a particular interpretation of a fundamentally ambiguous question must be dismissed. Whether a predicate question is "fundamentally ambiguous" is a "question of law for the court" to resolve before trial. *United States v. Chujoy*, 207 F. Supp. 3d 626, 651 (W.D. Va. 2016) (citing *Sarwari*, 669 F.3d at 407); *United States v. Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987), *abrogated on other grounds by*, *United States v. Wells*, 519 U.S. 482, 486, n.3 (1997) (explaining that when a question is "fundamentally ambiguous," "it is not amenable to jury interpretation"). And if a court decides that the predicate question is fundamentally ambiguous, the charge must be dismissed if it does not allege that the defendant's answer was false under every interpretation of the question. *See United States v. Serafini*, 167 F.3d 812, 824 (3d Cir. 1999) ("As there is no allegation that—with the question so understood—the defendant's answer was false, that subportion of the indictment pertaining to statement 3 was rightly stricken.").

A. Senator Cruz's Questions at the 2020 Senate Hearing Were Fundamentally Ambiguous

A question is fundamentally ambiguous if there are multiple ways to interpret it and "'men of ordinary intellect [would not] agree'" on which interpretation is correct. *Chujoy*, 207 F. Supp. 3d at 651 (alteration in original) (quoting *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986)). For instance, courts regularly deem "compound questions" fundamentally ambiguous when they make it difficult for a witness to tell which part of the question he should respond to. *See id*. (citing *Strohm*, 671 F.3d at 1179); *see, e.g.*, *United States v. Landau*, 737 F. Supp. 778, 783 (S.D.N.Y. 1990); *United States v. Rendon-Marquez*, 79 F. Supp. 2d 1361, 1363-64 (N.D. Ga. 1999). Other factors that bear on whether a question is fundamentally ambiguous include "the context of the question and answer," the "inherent vagueness . . . of certain words and phrases," and "defects in syntax or grammar in a question." *Chujoy*, 207 F. Supp. 3d at 651 (citing *Strohm*, 671 F.3d at 1179).

Senator Cruz's questions are fundamentally ambiguous because people of ordinary intellect would not be expected to understand that he meant to ask a broad question about Mr. Comey's interactions with anyone at the FBI—including Daniel Richman—during a colloquy focused on Mr. McCabe. On the contrary, a reasonable person readily would have understood Senator Cruz to be asking only whether Mr. Comey had specifically authorized Mr. McCabe to be an anonymous source in news reports.

1. Senator Cruz's imprecise compound questions made it unclear whether he was asking about Mr. McCabe or FBI officials more broadly

When a government official "combines two or more discrete inquiries in one question" but "elicits a single response from the witness, it may be impossible . . . to know which question the witness believed he was answering." Harrison, *supra* at 405; *see, e.g.*, *Landau*, 737 F. Supp. at 783 (finding "compound question that elicited a singular response" to be fundamentally ambiguous). That is exactly what Senator Cruz did at the 2020 Senate Hearing.

As relevant here, Senator Cruz asked Mr. Comey two questions, each of which contained a discrete inquiry about Mr. McCabe and a discrete inquiry about FBI officials more broadly. As a prelude to his first question, Senator Cruz described the 2017 exchange between Mr. Comey and Senator Grassley:

> On May 3, 2017 in this committee, Chairman Grassley asked you point blank "have you ever been an anonymous source in news reports about matters relating to the Trump investigation or the Clinton investigation?" You responded under oath "never." He then asked you "have you ever authorized someone else at the FBI to be an anonymous source in news reports about the Trump investigation or the Clinton administration." You responded again under oath, "no."

See Oversight Hearing Video Clip. Senator Cruz did not stop and ask Mr. Comey whether his statements to Senator Grassley were true. Instead, he continued on to describe a statement by Mr. McCabe:

> Now, as you know, Mr. McCabe, who works for you, has publicly and repeatedly stated that he leaked information to The Wall Street Journal and that you were directly aware of it and that you directly authorized it. Now, what Mr. McCabe is saying and what you testified to this committee cannot both be true; one or the other is false.

Id. He then asked: "Who's telling the truth?" *Id.* By structuring his question that way, Senator Cruz raised two issues: (1) whether Mr. Comey was telling the truth in his 2017 exchange with Senator Grassley, and (2) whether Mr. McCabe was telling the truth in what Senator Cruz incorrectly characterized as Mr. McCabe's recent statements. But instead of asking Mr. Comey to address each of those issues separately, he only asked Mr. Comey to address the question of whether Mr. Comey or Mr. McCabe was telling the truth.

The compound structure of Senator Cruz's second question was nearly identical to the first. After Mr. Comey responded to the first question, Senator Cruz stated: "So, your testimony is you've never authorized anyone to leak." *See id.* Senator Cruz then paused and, after a moment, proceeded to ask a question: "And Mr. McCabe when if he says contrary is not telling the truth, is that correct?" *Id.* By structuring his comment and question that way, Senator Cruz signaled to Mr. Comey that he should specifically address the question about whether Mr. McCabe was lying.

Courts have regularly determined that similar compound questions are fundamentally ambiguous. In *Landau*, for instance, the government had asked the defendant, a general contractor whose work for a company had been delayed due to union picketing, whether he had told the company or its representatives that he "had to make payments to the union or that it was necessary because of the union's picketing that it cost you more money." 737 F. Supp. at 780-81. The court held that the question was fundamentally ambiguous because it compounded two separate inquiries—"whether payments to the union were necessary and whether the picketing cost more money"—and "elicited a singular response." *Id.* at 783. Accordingly, the court concluded that the question could not "as a matter of law . . . support a perjury conviction" and dismissed the indictment. *Id.* at 784-85.

Similarly, in *Rendon-Marquez*, the court determined that the following question on an Immigration and Naturalization Service form was too ambiguous to support a conviction under Section 1001:

> Have you knowingly committed any crime or offense, for which you have not been arrested; or have you been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance, including traffic violations?

79 F. Supp. 2d at 1362. The court explained that the form "asked two separate and distinct questions" but "provided space for only one 'yes' or 'no' answer." *Id.* at 1363.

Likewise, each of Senator Cruz's questions compounded two separate inquiries—whether Mr. Comey was telling the truth in 2017 and whether Mr. Comey had authorized Mr. McCabe to be an anonymous source—but asked for the equivalent of a "yes" or "no" response only as to the second inquiry. Any reasonable witness would have found it difficult to know that Senator Cruz wanted Mr. Comey both to answer the binary question just asked and also to address the prior comments. This is especially so where the questioner did not confront Mr. Comey with what the government is now claiming he "then and there" knew (alleged conduct involving Mr. Richman) but instead confronted Mr. Comey with an inaccurate account of Mr. *McCabe's* statements.

2. Senator Cruz's use of alternating narrow and broad questions reinforces that the line of questioning was fundamentally ambiguous

Even if Senator Cruz's use of compound questions did not by itself make those questions fundamentally ambiguous, context confirms that Mr. Comey could not have reasonably known that Senator Cruz was asking him to answer a broad question about anyone at the FBI when asked a specific question about Mr. McCabe. As noted, the "context of the question and answer" can establish that a witness could not have understood what he was being asked. *Chujoy*, 207 F. Supp. 3d at 651 (citing *Strohm*, 671 F.3d at 1179); *see United States v. Paolicelli*, 505 F.2d 971, 973 (4th Cir. 1974) (citing *Fotie v. United States*, 137 F.2d 831, 842 (8th Cir. 1943)) (explaining that a false statement charge cannot "be sustained by the device of lifting a statement of the accused out of its immediate context and thus giving it a meaning wholly different than that which its context clearly shows"). Accordingly, the court "must look to the context of the defendant's statement to determine whether the defendant and his questioner joined issue on a matter of material fact" to which the defendant allegedly uttered a false material declaration. *Serafini*, 167 F.3d at 821 (citing *United States v. Sainz*, 772 F.2d 559, 562 (9th Cir. 1984)).

As relevant here, context can establish that a defendant would have understood a facially broad question to have a much narrower focus. The Third Circuit's decision in *Serafini*, which affirmed the district court's pre-trial dismissal of a perjury charge, is instructive. *See id.* at 816-19. As part of an investigation into suspected campaign finance violations, the government asked the defendant a series of three questions about a $2,000 check he had received from his nephew, ostensibly as a reimbursement for his $1,000 donation to Bob Dole's presidential campaign:

> **Question 1:** Is there any check that your [*sic*] received that reimbursed you other than that $2,000 check for your contribution?
>
> **Answer:** No.
>
> **Question 2:** Is there another check that you are aware of that is connected to this investigation, to this Dole contribution, other than the $2,000?
>
> **Answer:** Not other than what you have shown me today, no.
>
> **Question 3:** Did you receive any other money, whether by cash, or check, or any other form from Michael at or around the time period you made your Dole contribution other than this $2,000 check?
>
> **Answer:** I can't specifically remember, however, we transfer money back and forth quite often for different reasons and I can't honestly say that there wasn't some kind of transfer, I mean, we do it all of the time.

Id. at 818. After discovering that the $2,000 had served to reimburse both the defendant and his aide for respective $1,000 contributions, the government charged the defendant with making a false statement in response to Question 2. *Id.* at 819. The government claimed that Question 2 had asked the defendant to identify any other check he was aware of and that he had been aware of at least two others—the aide's check to the campaign and his check reimbursing the aide. *Id.*

The Third Circuit held that Question 2 was fundamentally ambiguous because "read in context, the question takes on a particular meaning wholly at odds with the 'broad, openended' significance the government now seeks to attribute to it." *Id.* at 820. The court explained that although Question 2 could in isolation be interpreted as asking whether the defendant was aware of *any* other checks, the government's "antecedent and subsequent questions" focused on whether the defendant had *personally received* any other reimbursement checks. *Id*. at 819, 821. Given the "narrow subject matter" of those questions, the court explained, the defendant could easily have interpreted the "'sandwiched' question" to ask whether he had personally received other checks from his nephew besides the $2,000 check. *See id.* at 821. Indeed, the best way for the defendant "to inject into the question sufficient intelligibility so that he could reply" was to "treat the question as referentially sequential to questions he had just answered." *Id.* Context thus showed that the defendant would not have understood the question to have "the limitlessly capacious construction the government would have it bear." *Id.*

Context shows that the questions at issue here were even more ambiguous and unfair than those in *Serafini*, as Mr. Comey was expressly invited to answer only the narrower questions. As explained above, Senator Cruz began by summarizing Mr. Comey's response to Senator Grassley's broad question about whether Mr. Comey had "ever authorized someone else at the FBI to be an anonymous source in news reports." *See* Oversight Hearing Video Clip. But Senator Cruz then narrowed his focus, incorrectly asserting that "Mr. McCabe, who works for you, has publicly and repeatedly stated that he leaked information to the Wall Street Journal and that you were directly aware of it and that you directly authorized it." *Id.* Accordingly, when Senator Cruz asked Mr. Comey to address "Who's telling the truth," *id.*, the best—and perhaps only—way for Mr. Comey to "inject into the question sufficient intelligibility so that he could reply" was to "treat the question as referentially sequential" to Senator Cruz's "immediately antecedent" assertion about Mr. McCabe. *Serafini*, 167 F.3d at 821. In other words, a reasonable witness most readily would have understood Senator Cruz to be asking him to specifically address whether he had authorized Mr. McCabe to serve as a source to the Wall Street Journal. Similarly, although Senator Cruz began his second question by referencing Mr. Comey's general statement that he had "never authorized anyone to leak," he again narrowed his focus, asking: "And Mr. McCabe when if he says contrary is not telling the truth, *is that correct?*" Oversight Hearing Video Clip (emphasis added).

Context thus underscores that Count One rests on a fundamentally ambiguous question.[5] As the indictment frames it, Senator Cruz's question was whether Mr. Comey had "authorized *someone else* at the FBI to be an anonymous source in news reports." ECF No. 1 at 1 (emphasis added). But that quoted language is taken from a statement by Senator Cruz that is a preface to the question that followed four seconds later. *See* Oversight Hearing Video Clip. When fairly "read in context, the question takes on a particular meaning wholly at odds with the 'broad, openended' significance the government now seeks to attribute to it," *Serafini*, 167 F.3d at 820—specifically, that context suggests that Senator Cruz was asking only about whether Mr. Comey had authorized Mr. McCabe to be an anonymous source to the Wall Street Journal.[6]

3. Senator Cruz's questions were riddled with other ambiguities that would have made it difficult for any reasonable person to understand them

Senator Cruz's focus on Mr. McCabe is alone sufficient to establish fundamental ambiguity when measured against the government's current apparent interpretation. But there is more: Senator Cruz's questions were riddled with other ambiguities that would have made it difficult for any reasonable person to understand them in the moment. For instance, Senator Cruz asked Mr. Comey to affirm or deny prior testimony that he authorized "someone else at the FBI to be an anonymous source in news reports about the Trump investigation or the Clinton *administration*." Oversight Hearing Video Clip (emphasis added). As of May 3, 2017, there was no "Trump investigation," but rather an investigation into whether there were links between four individuals associated with the Trump presidential campaign and Russia. *See* Report On The Investigation Into Russian Interference In The 2016 Presidential Election Vol. II at 58 ("Comey also told the President that congressional leaders were aware that the FBI was not investigating the President personally."), https://perma.cc/W3DH-PLS3. And the "Clinton Administration" had ceased to exist some 17 years before. Senator Grassley's original question in 2017 was about the "Clinton *investigation*." 2017 Hearing Transcript at 5 (emphasis added).

Senator Cruz's use of the words "never" and "ever" injected additional ambiguity. Courts have explained that questions asking witnesses to recall whether they "ever" have done something are ambiguous because it is difficult to answer them without a perfect memory. *See United States v. Razzaia,* 370 F. Supp. 577, 579 (D. Conn. 1973). Questioners can "avoid[]" such "ambiguities" by "focus[ing] the witness's attention on [a] particular" day or time. *Id.*; *see also Landau*, 737 F. Supp. at 781 (finding questions that asked witness whether he "never" had done something to be ambiguous). Accordingly, when Senator Cruz referenced Senator Grassley's question asking whether Mr. Comey "ever authorized someone else at the FBI to be an anonymous source in news reports," *see* Oversight Hearing Video Clip, he made it even more difficult for Mr. Comey to understand what he was asking.

Finally, when Senator Cruz referenced Senator Grassley's question about whether Mr. Comey authorized "someone else *at the FBI*" to serve as anonymous source, there was no reason to assume that he was referring to anyone but full-time employees like Mr. McCabe—who were stationed at the FBI—as opposed to someone like Mr. Richman, who was a Special Government Employee living fulltime in New York. *Id.* Senator Cruz's errors are "a form of imprecision whose consequences must be laid at the table of the questioner, not the questioned." *Serafini*, 167 F.3d at 824 (cleaned up) (citing *Sainz*, 772 F.2d at 563).[7]

B. Count One Rests on a Particular Interpretation of Senator Cruz's Fundamentally Ambiguous Questions and Thus Must Be Dismissed

Persons of ordinary intellect could—and likely would—have understood Senator Cruz to be asking Mr. Comey whether he authorized Mr. McCabe to serve as an anonymous source to the Wall Street Journal. Thus, because there is "no allegation that—with the question so understood—[Mr. Comey's] answer was false," Count One should be "stricken." *Serafini*, 167 F.3d at 824.

The indictment alleges that Mr. Comey's "statement was false, because . . . he in fact had authorized PERSON 3 to serve as an anonymous source in news reports regarding an FBI investigation concerning PERSON 1." ECF No. 1 at 1. On October 15, 2025, the government confirmed to the defense that PERSON 3 refers to Daniel Richman and PERSON 1 refers to Hillary Clinton. But as noted, a reasonable person could have understood Senator Cruz's questions to be entirely unrelated to Mr. Richman or anyone else at the FBI—and to have focused on Mr. McCabe alone.

On that reasonable understanding, the indictment contains no allegations that Mr. Comey's answers were false: it never alleges that Mr. Comey made a false statement regarding Mr. McCabe. On the contrary, the indictment omits Senator Cruz's statements about Mr. McCabe, obscuring the context necessary to understand both the questions themselves and Mr. Comey's responses. The indictment thus impermissibly "lift[s] a statement of the accused out of its immediate context" and "giv[es] it a meaning wholly different than that which its context clearly shows." *Paolicelli*, 505 F.2d at 973. As a result, Count One cannot "be sustained." *Id.*

II. MR. COMEY'S LITERALLY TRUE ANSWERS SEPARATELY WARRANT DISMISSAL OF COUNT ONE

Regardless of whether Senator Cruz's questions were fundamentally ambiguous, the Court should also dismiss Count One because Mr. Comey's answers were literally true. Where a Video Clip. A direct answer to this question would have required Mr. Comey to respond either, "I am telling the truth" or "Andrew McCabe is telling the truth." Mr. Comey, however, did not respond by stating who was telling the truth. He stated: "I can only speak to my testimony. I stand by . . . the testimony you summarized that I gave in May of 2017." *See id.* Although those statements did not respond directly to Mr. Cruz's question, they were literally true. Mr. Comey could only speak to his own testimony—he could not read Mr. McCabe's mind and know whether Mr. McCabe intentionally lied in the statements described by Senator Cruz. This is all the more true where Senator Cruz cited statements that Mr. McCabe simply had not made. Likewise, Mr. Comey's statement that he stood by his prior testimony was truthful regardless of whether that prior testimony was itself truthful.[8]

The same is true of Mr. Comey's answer to Senator Cruz's second question. Senator Cruz asked: "So, your testimony is you've never authorized anyone to leak. And Mr. McCabe when if he says contrary is not telling the truth, is that correct?" *See* Oversight Hearing Video Clip. A direct answer to this question would have required Mr. Comey to state either, "Correct, Andrew McCabe is not telling the truth," or "Incorrect, Andrew McCabe is telling the truth." Mr. Comey said neither of those things. He instead stated that he was "not going to characterize Andy's testimony, but mine is the same today." *See id.* Again, that response is literally true. Mr. Comey in fact did not characterize Mr. McCabe's testimony. And his statement that his testimony is "the same today" simply meant that he did not intend to revisit his prior testimony. That was a literally true statement regardless of whether the prior testimony was itself truthful.

Further, as detailed above, Senator Cruz's questions referenced whether Mr. Comey authorized anonymous sources to report on the "Trump investigation," which did not exist during his tenure as FBI Director, and the "Clinton administration," which had ended nearly 17 years earlier. *See supra* at 14. So Mr. Comey's answers to the questions were literally true, and the government cannot incorrectly rewrite his responses to form a false-statements charge. Ignoring those details, the government presented an indictment to the grand jury that misstates Mr. Comey's testimony. But if a person cannot be charged by "the device of lifting a statement of the accused out of its immediate context and thus giving it a meaning wholly different than that which its context clearly shows," *Serafini*, 167 F.3d at 820 (citation omitted), he certainly cannot be charged where the statement lifted out of context must be rewritten to claim that it is false.

In sum, although Mr. Comey did not respond directly to Senator Cruz's questions, his responses were literally true. Section 1001(a)(2) does not criminalize non-responsive testimony—it criminalizes only *false* testimony. And Mr. Comey's testimony here cannot plausibly be characterized as false. Of course, Senator Cruz could have followed up by asking for clearer answers, or he could have reframed his initial questioning with greater precision. Or Senator Cruz could have asked Mr. Comey about other specific individuals, including Mr. Richman. But he did not. And that is what the questioner must have done if the government wishes later to prosecute a defendant. *Bronston*, 409 U.S. at 360 (noting "burden is on the questioner to pin the witness down to the *specific* object of the questioner's inquiry" (emphasis added)). The questioner must "press on for the information he desires." *Id.* at 362. "The government cannot now correct this failure by a prosecution for making a false declaration." *Earp*, 812 F.2d at 919-20 (citing *Bronston*, 409 U.S. at 362). Accordingly, regardless of whether Senator Cruz's questions were fundamentally ambiguous, Count One should be dismissed on the independent basis that Mr. Comey's answers were literally true.

III. COUNT TWO SHOULD BE DISMISSED FOR SIMILAR REASONS

Count Two alleges that Mr. Comey violated Section 1505 by making "false and misleading statements" to the Senate Judiciary Committee. ECF No. 1 at 2. The indictment does not, however, specify which "false and misleading statements" Mr. Comey allegedly made, why they were allegedly false or misleading, or even which investigation he allegedly endeavored to corrupt.

To the extent Count Two rests on the same false statements as Count One, that count should also be dismissed for the reasons set forth herein. But as it stands, Count Two's lack of specificity renders it inherently and separately defective for failing to provide adequate notice to Mr. Comey of the charge against which he must defend. *See Russell*, 369 U.S. at 766.

Such notice is of paramount importance here because of the broad scope of the relevant congressional hearing and the many topics covered in prolonged testimony. The government cannot try Mr. Comey on cherry-picked statements from a four-hour hearing without specifying which statement it believes is false or misleading. And surely the government does not believe that it may secure an indictment based on one statement placed before the grand jury and then switch to a different statement at trial. That tactic would defeat the entire purpose of the grand jury performing its charging function. *See id.* It also provides yet another reason for disclosure of the grand jury proceedings, as Mr. Comey's concurrently filed Motion to Disclose Grand Jury Proceedings requests. And it is a further basis to grant Mr. Comey's concurrently filed Motion for Bill of Particulars as to this charge. Accordingly, the lack of specificity in Count Two deprives Mr. Comey of his right to notice of the charge against him, and that count is subject to dismissal based on that deficiency alone.

CONCLUSION

For the foregoing reasons, the indictment should be dismissed with prejudice.

Dated: October 30, 2025

Respectfully submitted,

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of October, 2025, a true copy of the foregoing document was filed electronically through the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jessica N. Carmichael
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[1] Before the hearing, the committee agreed that it would be limited to four specific topics: (i) "Crossfire Hurricane," (ii) the December 2019 Department of Justice Inspector General report's "Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation," (iii) the Carter Page FISA applications, and (iv) Christopher Steele's source network and primary sub-source.

[2] For the rest of this brief, references to the exchange between Mr. Cruz and Mr. Comey cite to the Oversight Hearing Video Clip, which provides the most accurate depiction of the exchange. But the Oversight Hearing Transcript is a useful reference as well.

[3] Compounding the ambiguity, Senator Cruz mischaracterized Mr. McCabe's actual statements in claiming a contradiction between Mr. McCabe's account and Mr. Comey's testimony. There is no record of Mr. McCabe ever stating that Mr. Comey authorized him to leak information to the Wall Street Journal, much less a record of "repeated" and "public" statements to that effect. Mr. McCabe was interviewed multiple times and in none of those interviews did Mr. McCabe assert that he spoke in advance with Mr. Comey about his disclosure to the Wall Street Journal. Rather, Mr. McCabe stated in his last interview that he informed Mr. Comey that he had leaked information *after* he had done so. Office of the Inspector General, Department of Justice, *A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe*, at 12 (Feb. 2018), https://perma.cc/GKQ7-DAJP. Indeed, more than two years *before* the hearing, the Department of Justice's Office of Inspector General found that Mr. McCabe did not consult with Mr. Comey before talking to news outlets. *See id.* at 33-34.

[4] "Though *Bronston* dealt with a perjury charge," the Fourth Circuit has "since applied its holding to § 1001 offenses." *United States v. Smith*, 54 F.4th 755, 767 (4th Cir. 2022).

[5] To be sure, even if the narrow and broad interpretations were equally plausible, the questions were fundamentally ambiguous.

[6] Adding to this context, Mr. Comey voluntarily agreed to testify at this particular hearing on the understanding that the topics of questioning would be limited to only four topics, none of which related to the Midyear Exam investigation involving Hillary Clinton. *See supra* at 2 n.1.

[7] The best way to fully appreciate the ambiguity of Senator Cruz's questions is to watch the Oversight Hearing Video Clip submitted to the Court as Exhibit A.

[8] Mr. Comey firmly maintains that his prior testimony *was* truthful. But for purposes of the literal truth defense, the truthfulness of the prior testimony is irrelevant. Mr. Comey can truthfully "stand by" prior testimony—even if the government were correct (and it is not) that the prior testimony was false. Accordingly, the statement that Mr. Comey "stand[s] by" his prior testimony cannot serve as the basis for a false statement charge.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America,)
v.) Case No.: 1:25-CR-00272-MSN
James B. Comey, Jr.,)
Defendant.)

JAMES B. COMEY JR.'S MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO DISCLOSE GRAND JURY PROCEEDINGS

James B. Comey, Jr., by and through undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 6(e), moves this Court to order the disclosure of the transcript and audio recordings of the grand jury proceedings. The indictment at issue—which facially misstates Mr. Comey's testimony—was sought by an inexperienced prosecutor and returned after business hours with a meager 14 votes after an earlier no true bill. Those facts, in combination with signs of other potential misconduct, indicate that a ground may exist to dismiss the indictment. Accordingly, disclosure of the grand jury proceedings is warranted.

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INTRODUCTION

The record in this case raises a significant risk that irregularities in the grand jury process may have influenced the grand jury to return an indictment. Thus, pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(ii), defendant James B. Comey, Jr., respectfully requests that the Court direct the government to disclose the transcripts and audio recordings of all proceedings before the grand jury in this case. Although proceedings before the grand jury are typically entitled to a presumption of regularity, the abundant irregularities surrounding the return of the indictment in this case overcome that presumption and warrant disclosure of the grand jury record.

Those irregularities may create a basis for dismissing the indictment. As Mr. Comey has explained in two motions to dismiss, the indictment arises from multiple constitutional violations. Those violations warrant dismissal regardless of any grand jury misconduct, but they also support a reasonable inference of irregularities before the grand jury. Additionally, the circumstances surrounding the return of the indictment in this case indicate that the government may have misstated key factual and legal issues to the grand jury. Despite the absence of any lawful basis for her appointment as interim U.S. Attorney, Lindsay Halligan—a former insurance lawyer who lacks any prosecutorial experience—presented this case to the grand jury alone. She secured an indictment only after a highly unusual procedure, which included keeping the grand jury in court well past normal business hours. What is more, the agent who served as a witness in the proceedings may have been exposed to Mr. Comey's privileged communications with his attorneys and thus may have conveyed that information to the grand jury. Each of those irregularities provides an independent basis for the Court to permit the defense to review the record of the grand jury proceedings in this case.

STATEMENT OF FACTS

A. President Trump Pressures Prosecutors to Indict Mr. Comey

After years of publicly criticizing Mr. Comey's speech and character, President Trump orchestrated Mr. Comey's indictment mere days before the statute of limitations expired. *See* 18 U.S.C. § 3282(a) (five-year statute of limitations). As detailed in Mr. Comey's Motion to Dismiss the Indictment Based on Vindictive and Selective Prosecution, *see* ECF No. 59, beginning in or around July 2025, special agents of the Federal Bureau of Investigation (FBI) and a team of career prosecutors from the U.S. Attorney's Office for the Eastern District of Virginia (EDVA) began investigating Mr. Comey. *See* Brooke Singman, *FBI Launches Criminal Investigation of John Brennan, James Comey: DOJ Sources*, FOX News (July 8, 2025), https://perma.cc/J25X-C85P; Glenn Thrush, et al., *U.S. Attorney Investigating Two Trump Foes Departs Amid Pressure From President*, N.Y. Times (Sept. 19, 2025), https://perma.cc/Q75E-873N.

The subject of that investigation overlapped with conduct that the FBI and Department of Justice (DOJ) had previously investigated at length before concluding that the evidence and the law did not support criminal charges. In August 2017, the DOJ and the FBI initiated "Arctic Haze," an investigation into whether Mr. Comey had illegally disclosed classified information to the news media through Daniel Richman, a Columbia Law School professor and former FBI Special Government Employee. *See* Memorandum on Closing Arctic Haze Investigation at -057 (Sept. 8, 2017), in Declassified FBI Materials Produced to the House Judiciary Committee, https://perma.cc/HZN7-B5QN. The government ultimately concluded that there was not "sufficient evidence to criminally charge any person, including Comey or Richman." *Id.* at -065.

Additionally, in March 2019, Attorney General William Barr appointed John Durham as Special Counsel to review the FBI's and DOJ's handling of investigations into alleged connections between President Trump's 2016 campaign and the Russian government during Mr. Comey's tenure as FBI Director. *See* John H. Durham, Rep. on Matters Related to Intel. Activities & Investigations Arising Out of the 2016 Presidential Campaigns (May 12, 2023), https://perma.cc/AB9S-BUFE. As part of the investigation, Special Counsel Durham scrutinized whether the FBI had mishandled the Crossfire Hurricane investigation. *See id.* at 46-68. Although the final "Durham Report" offered critiques of the FBI's investigative standards, it did not find that Mr. Comey or any other senior FBI personnel violated any federal criminal statutes. *See id.* at 17-19.

In September 2025, the team of EDVA career prosecutors interviewed Mr. Richman, but he was "not helpful" in their efforts to build a case. Glenn Thrush, et al., *Inside the Trump Administration's Push to Prosecute James Comey*, N.Y. Times (Sept. 27, 2025), https://perma.cc/6MFG-8D3U. The government also reportedly interviewed Special Counsel Durham, who stated that his investigation had not uncovered evidence supporting charges against Mr. Comey. *See* Katherine Faulders, et al., *Ex-Special Counsel John Durham undercut case against James Comey in interview with prosecutors: Sources*, ABC News (Oct. 6, 2025), https://perma.cc/EJ4Z-D66B. Multiple reports also stated that the career prosecutors ultimately concluded that no case should be brought against Mr. Comey, including because the evidence did not establish probable cause to believe he committed a crime.[1] *See id.*; Thrush, et al., *Inside the Trump Administration's Push to Prosecute James Comey*, *supra*; Jeremy Herb, et al., *Inside the seven tumultuous days that led to the James Comey Indictment*, CNN (Sept. 28, 2025), https://perma.cc/4VP7-86ZV.

In response, the Trump Administration reportedly pressured interim U.S. Attorney Erik Siebert to indict Mr. Comey, among others. *See* Thrush, et al., *U.S. Attorney Investigating Two Trump Foes Departs Amid Pressure From President*, *supra*. President Trump had nominated Mr. Siebert to the permanent post of U.S. Attorney, and Mr. Siebert had been unanimously appointed to continue as interim U.S. Attorney by the judges in this district and therefore supervised the career EDVA prosecutors investigating this case. But when Mr. Siebert appeared unwilling to follow President Trump's instructions, President Trump told reporters in the Oval Office that he wanted Mr. Siebert "out." *Id.* Mr. Siebert resigned on September 19, 2025. *Id.* The DOJ then demoted First Assistant U.S. Attorney Maya Song (she was later fired on September 26). *See* Katherine Faulders, et al., *More Turmoil at Virginia US attorney's office following Comey indictment: 2 top prosecutors fired, sources say*, ABC News (Oct. 2, 2025), https://perma.cc/R2HW-V5Y9.

The next day, President Trump publicly posted a statement on social media explicitly pressing the Attorney General to prosecute Mr. Comey, New York Attorney General Leticia James, and Senator Adam Schiff. The post read as follows:

> "Pam: I have reviewed over 30 statements and posts saying that, essentially, "same old story as last time, all talk, no action. Nothing is being done. What about Comey, Adam "Shifty" Schiff, Leticia??? They're all guilty as hell, but nothing is going to be done." Then we almost put in a Democrat supported U.S. Attorney, in Virginia, with a really bad Republican past. A Woke RINO, who was never going to do his job. That's why two of the worst Dem Senators PUSHED him so hard. He even lied to the media and said he quit, and that we had no case. No, I fired him, and there is a GREAT CASE, and many lawyers, and legal pundits, say so. Lindsey Halligan is a really good lawyer, and likes you, a lot. We can't delay any longer, it's killing our reputation and credibility. They impeached me twice, and indicted me (5 times!), OVER NOTHING. JUSTICE MUST BE SERVED, NOW!!! President DJT."

Donald J. Trump (@realDonaldTrump), Truth Social (Sept. 20, 2025, at 18:44 ET), https://perma.cc/A7RW-2TEC.

Less than 48 hours after President Trump's post, Lindsey Halligan was purportedly sworn in as interim U.S. Attorney for this District. *See* Exhibit A to Mot. to Dismiss Indictment Based on Vindictive & Selective Prosecution, ECF No. 59-1. Ms. Halligan was a special assistant to the President and White House official. *See* Alan Feuer, *Trump's Pick to Replace Ousted U.S. Attorney Lacks Prosecutorial Experience*, N.Y. Times (Sept. 24, 2025), https://perma.cc/YW66-M3HF. She had previously worked as an insurance lawyer and personal lawyer for President Trump and had no prosecutorial experience. *See id.*; Compl., *Trump v. United States*, No. 22-cv-81294 (S.D. Fl. Aug. 22, 2022), ECF No. 1.

The Attorney General purported to appoint Ms. Halligan pursuant to 28 U.S.C. § 546, which provides that "the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant," but specifies that "[a] person appointed" through that mechanism may not serve beyond "the expiration of 120 days after appointment by the Attorney General under this section." 28 U.S.C. § 546(a), (c)(2); *see* Halligan Appointment Sheet, Exhibit A. Section 546 further states that "[i]f an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled." 28 U.S.C. § 546(d). Because Mr. Siebert had previously been appointed under Section 546(a) and more than 120 days had elapsed since that appointment, the Attorney General lacked authority to appoint Ms. Halligan under Section 546.[2]

B. President Trump's Hand-Picked Interim U.S. Attorney Indicts Mr. Comey in a Highly Unusual Proceeding

On her fourth day in office, September 25, 2025, Ms. Halligan sought a grand jury indictment of Mr. Comey—just days before the five-year statute of limitations on Mr. Comey's purported offense was set to expire. *See* 18 U.S.C. § 3282. No other prosecutor from the U.S. Attorney's Office for EDVA participated in the grand jury presentation.[3] *See* Tr. of Return of Grand Jury Indictment Proceedings at 4 (Sept. 25, 2025) ("Grand Jury Transcript"), ECF No. 10; *see also* Carol Leonnig, et al. *How Trump's new U.S. attorney got Comey indicted – by herself*, MSNBC, (Sept. 26, 2025), https://perma.cc/R886-ADRW.

Ms. Halligan appears to have called one of the lead FBI case agents as a witness. *See* ECF No. 7. The same day the agent testified in the grand jury, he alerted the FBI Office of the General Counsel "[redacted]" involving Mr. Comey and his attorneys. ECF No. 89-5 at 2088 (Ex. E). The FBI Office of the General Counsel (OGC) subsequently informed the agent that [redacted] in this case. *Id.*[4] Despite his apparent awareness of his potential exposure to privileged material, the agent nevertheless apparently served as a witness presenting evidence to the grand jury in this case.

Based on evidence presented through that agent, Ms. Halligan first presented the grand jury with a three-count indictment. The grand jury returned a "no true bill" on that indictment. *See* Grand Jury Transcript at 4-6. Rather than leaving and reconvening on a later date, however, the grand jury remained well past normal court hours. *See id.* at 1, 7. At 6:47 p.m., the grand jury returned a true bill on a new two-count indictment by only a two-vote margin. *See id.* at 1-4, 7; Jacob Rosen, et al., *Judge who reviewed James Comey's indictment was confused by prosecutor's handling of case, transcript shows*, CBS News (Sept. 26, 2025), https://perma.cc/R654-4Q45. Ms. Halligan's inexperience was apparent during the return proceeding, as she expressed confusion about the indictment paperwork, including by signing both the three-count indictment and the two-count indictment. *See* Grand Jury Transcript at 4-5.

C. The Indictment Is Facially Flawed

Count One of the indictment charges Mr. Comey with making false statements to Congress, in alleged violation of 18 U.S.C. § 1001(a)(2). *See* ECF No. 1 at 1. The indictment alleges that on or about September 30, 2020, Mr. Comey "falsely stat[ed] to a U.S. Senator during a Senate Judiciary Committee hearing that he . . . had not 'authorized someone else at the FBI to be an anonymous source in news reports' regarding an FBI investigation concerning [Hillary Clinton].'" *Id.* The indictment further alleges that Mr. Comey's "statement was false, because, as [Mr. Comey] then and there knew, he in fact had authorized [Daniel Richman] to serve as an anonymous source in news reports regarding an FBI investigation concerning [Hillary Clinton]." *Id.*[5] Count Two charges Mr. Comey with "corruptly endeavor[ing] to influence, obstruct and impede" a Senate Judiciary Committee investigation on or about the same date "by making false and misleading statements before that committee," in alleged violation of 18 U.S.C. § 1505. *Id.* at 2.

The indictment focuses on testimony that Mr. Comey gave in response to questioning by Senator Ted Cruz at a Senate Judiciary Committee hearing on the Crossfire Hurricane investigation. *See Oversight of the Crossfire Hurricane Investigation: Day 3*, *Hearing Before the U.S. Senate Committee on the Judiciary*, 116th Cong. (Sept. 30, 2020), http://bit.ly/4o2ekHb. During that hearing, Senator Cruz described how, during 2017 testimony before the Senate Judiciary Committee, Mr. Comey had denied "ever authoriz[ing] someone else at the FBI to be an anonymous source in news reports about the Trump investigation or the Clinton Administration." *See* Exhibit A to Mot. to Dismiss Indictment Based on Fundamental Ambiguity & Literal Truth ("Oversight Hearing Video Clip"); Exhibit C to Mot. to Dismiss Indictment Based on Vindictive & Selective Prosecution, ECF No. 59-3 at 11 ("Oversight Hearing Transcript").[6] Senator Cruz then incorrectly asserted to Mr. Comey that Andrew McCabe, who previously served as Mr. Comey's Deputy Director of the FBI, "publicly and repeatedly stated that he leaked information to The Wall Street Journal and that you were directly aware of it, and that you directly authorized it." *See* Oversight Hearing Video Clip.

Senator Cruz asked Mr. Comey "[w]ho's telling the truth?" Mr. Comey responded: "I can only speak to my testimony," and "I stand by what, the testimony you summarized that I gave in May of 2017." *Id.* Senator Cruz followed up by asking: "So, your testimony is you've never authorized anyone to leak. And Mr. McCabe when if he says contrary is not telling the truth, is that correct?" *Id.* In response, Mr. Comey stated: "Again, I'm not going to characterize Andy's testimony, but mine is the same today." *Id.*

The indictment misstates the exchange between Senator Cruz and Mr. Comey. Senator Cruz asked Mr. Comey to affirm or deny prior testimony that he authorized "someone else at the FBI to be an anonymous source in news reports about . . . the Clinton *administration*." *Id.* (emphasis added). But Senator Grassley's original questioning in 2017 spoke of the "Clinton *investigation*." *See* ECF No. 59-2 at 5 (Ex. B) (emphasis added). The indictment nonetheless mischaracterizes Mr. Comey as stating that he "had not 'authorized someone else at the FBI to be an anonymous source in news reports' *regarding an FBI investigation concerning PERSON 1*," ECF No. 1 at 1 (emphasis added). Thus, the indictment replaces Senator Cruz's reference to the "Clinton administration" with a reference to "PERSON 1" (Hillary Clinton) and misleadingly attributes statements to Mr. Comey that he did not in fact make during his September 30, 2020, testimony.

Further, the indictment omits Senator Cruz's words that explicitly narrow the focus of his questions to Mr. McCabe and misleadingly implies that the questioning related to Mr. Richman. In fact, Mr. Comey's September 2020 exchange with Senator Cruz made no reference whatsoever to Mr. Richman, who ultimately appears in the indictment as PERSON 3. Instead, the context of the exchange confirms that Senator Cruz was asking about leaks by Mr. McCabe—indeed, Senator Cruz asked Mr. Comey whether he or Mr. McCabe was "telling the truth." In other words, the indictment presents an inaccurate description of the testimony at the heart of this case.[7]

ARGUMENT

Under Federal Rule of Criminal Procedure 6(e)(3)(E)(ii), a court may order the disclosure of grand jury materials "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). That rule strikes a balance between two competing principles of criminal law. The first is that courts have the authority to "dismiss an indictment because of misconduct before the grand jury." *United States v. Williams*, 504 U.S. 36, 46 (1992) (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988)). That authority would be meaningless if defendants were unable to access grand jury materials and inform the court about potential misconduct. At the same time, "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424 (1983) (citations omitted). For that reason, courts must exercise caution when determining whether to order the disclosure of grand jury materials.

After balancing the relevant interests, courts may order disclosure under Rule 6(e)(3)(E)(ii) when defendants "establish[] that particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment." *United States v. Loc Tien Nguyen*, 314 F. Supp. 2d 612, 616 (E.D. Va. 2004) (citing *United States v. Abcasis*, 785 F. Supp. 1113, 1119 (E.D.N.Y. 1992)) (internal quotation marks omitted). That standard prevents "fishing expedition[s] to search for grand jury wrongdoing and abuse when there are no grounds to believe that any wrongdoing or abuse has occurred." *Id.* But it also recognizes a consensus among district courts that disclosure is appropriate when a defendant demonstrates a "particularized need" for grand jury materials. *United States v. Naegele*, 474 F. Supp. 2d 9, 10 (D.D.C. 2007) (citing cases).

This case presents multiple "particularized and factually based grounds" that warrant disclosure of grand jury materials.

First, as Mr. Comey has explained in earlier motions, the indictment should be dismissed because it arises from real and substantial improper conduct that supports a reasonable inference of irregularities before the grand jury—indeed, irregularities so severe and pervasive that they likely prejudiced the grand jurors' narrow decision to indict or at least gave rise to "grave doubt that its decision was free from [improper] influence." *Bank of Nova Scotia*, 487 U.S. at 256 (internal quotation marks omitted). *See* Mot. to Dismiss Indictment Based on Vindictive & Selective Prosecution, ECF No. 59; Mot. to Dismiss Indictment Based on Unlawful Appointment, ECF No. 60. More specifically, the train of events that led to this indictment involved public and prominent evidence that (1) it was driven by improper animus and (2) the prosecutor responsible for the case, because of her improper appointment, never should have been in the grand jury at all. *See* Fed. R. Crim. P. 6(d)(1) (listing persons permitted to be present in the grand jury and not including persons who do not qualify an as attorney for the government); Fed. R. Crim. P. 1(b)(1) (defining "Attorney for the government").

Second, given the highly irregular procedure that led to the indictment, there is a significant risk that the government misrepresented key issues of fact and law to the grand jury. Indeed, as explained further in Mr. Comey's concurrently filed Motion for a Bill of Particulars, the indictment itself fails to allege specifics necessary for Mr. Comey to understand and defend against the charges.

Third, the record suggests that an FBI agent who testified before the grand jury was potentially tainted by privileged communications between Mr. Comey and his attorneys, one of whom was likely Mr. Richman, yet the agent still proceeded to testify in front of the grand jury. There is thus a serious concern that the grand jury may have improperly relied on privileged information.

Each of these grounds independently warrants the disclosure of grand jury materials under Rule 6(e)(3)(E)(ii) to allow the defense to show that irregularities warrant dismissal of the

I. THE GOVERNMENT'S CONSTITUTIONAL VIOLATIONS WARRANT DISCLOSURE OF THE GRAND JURY MATERIALS

Mr. Comey has filed two motions to dismiss the indictment based on the government's constitutional violations in this case. One of those motions argues that the government has singled out Mr. Comey for prosecution because of his protected speech and because of President Trump's personal animus toward Mr. Comey. *See* Mot. to Dismiss Indictment Based on Vindictive & Selective Prosecution, ECF No. 59. Such a vindictive and selective prosecution violates the First Amendment, Due Process Clause, and equal protection principles. *See generally id.* The other motion, which has been transferred to U.S. District Judge Cameron McGowan Currie, argues that the indictment is fatally flawed because it results directly from a paradigmatic violation of the Appointments Clause and the statute authorizing appointments of interim U.S. Attorneys, 28 U.S.C. § 546. *See* Mot. to Dismiss Indictment Based on Unlawful Appointment, ECF No. 60.

Although those motions must be decided on their own merits, the circumstances described in both motions raise a strong possibility that there were "irregularities in the grand jury proceedings" that would provide a "basis for dismissal of the indictment." *Nguyen*, 314 F. Supp. 2d at 616 (citations omitted). Indeed, Judge Currie has already ordered the government to produce for *in camera* review "all documents relating to the indictment signer's participation in the grand jury proceedings, along with complete grand jury transcripts." ECF No. 95. Mr. Comey has argued that if Ms. Halligan alone secured and signed the indictment, dismissal would be required because she was unlawfully appointed. *See* Mot. to Dismiss Indictment Based on Unlawful Appointment at 18-25, ECF No. 60. And if she was unlawfully appointed, Ms. Halligan's appearance before the grand jury violated Federal Rule of Criminal Procedure 6(d)(1). *Id.* at 20-21; *see* Fed. R. Crim. P. 6(d)(1); Fed. R. Crim. P. 1(b)(1)(D). Rule 6(d)(1)—which permits only attorneys "authorized by law" to conduct grand jury proceedings—is one of the "few, clear rules which were carefully drafted and approved by th[e Supreme] Court and by Congress to ensure the integrity of the grand jury's functions," *Williams*, 504 U.S. at 46 (quoting *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring in the judgment)), the violation of which can support the Court's exercise of "supervisory power" to dismiss an indictment, *id.*, upon a proper showing of prejudice.

For similar reasons, disclosure of the grand jury materials is reasonably calculated to provide additional support for Mr. Comey's argument that he would not have been prosecuted but for President Trump's animus toward Mr. Comey, including because of his protected speech. *See generally* Mot. to Dismiss Indictment Based on Vindictive & Selective Prosecution, ECF No. 59. Objective evidence establishes that the President harbors such animus—he has spent the last eight years publicly attacking Mr. Comey's speech and character and calling for Mr. Comey to be prosecuted. *See id.* at 4-8. The record also shows that President Trump "prevailed upon [Ms. Halligan] to bring the charges . . . such that [she] could be considered a 'stalking horse.'" *See id.* at 21-22 (citing *United States v. Sanders*, 211 F.3d 711, 717 (2d Cir. 2000)). In turn, the government's manipulation of the prosecutorial process, including its repudiation of the views of every career prosecutor who assessed the case, makes clear that Mr. Comey would not have been prosecuted but for President Trump's animus. *Id.* at 22-26.

Although dismissal of the indictment is warranted on the record as it stands, disclosure of the grand jury materials would bolster Mr. Comey's arguments. Having served as his personal attorney and as a White House Official, Ms. Halligan has a close, longstanding relationship with President Trump. *Id.* at 11-12. And even though Ms. Halligan lacks prosecutorial experience, President Trump appointed her for the specific purpose of bringing this prosecution against Mr. Comey and other perceived political opponents. *Id.* at 23-24. Accordingly, there is a substantial risk that during her presentation to the grand jury, Ms. Halligan made statements that would support Mr. Comey's motion to dismiss. Such "irregularities in the grand jury proceedings" would "create a basis for dismissal of the indictment" and thus warrant disclosure of the grand jury materials. *Nguyen*, 314 F. Supp. at 616 (citations omitted).

II. THE RISK THAT THE GOVERNMENT MISREPRESENTED MATERIAL ISSUES OF FACT AND LAW WARRANTS DISCLOSURE OF THE GRAND JURY MATERIALS

The current record also reveals a significant risk that the government misstated key aspects of the charged offenses during its presentation to the grand jury. And "where a prosecutor's legal instruction to the grand jury seriously misstates the applicable law, the indictment is subject to dismissal if the misstatement casts 'grave doubt that the decision to indict was free from the substantial influence' of the erroneous instruction." *United States v. Stevens*, 771 F. Supp. 2d 556, 566-67 (D. Md. 2011) (citing *United States v. Peralta*, 763 F. Supp. 14, 21 (S.D.N.Y. 1991)). Accordingly, if the grand jury materials show that Ms. Halligan seriously misstated the applicable law and facts, the materials would provide an additional "basis for dismissal of the indictment." *Nguyen*, 314 F. Supp. at 616 (citation omitted).

A. Disclosure of the Grand Jury Materials Could Establish that the Government Misstated Essential Elements of Both Counts

As explained in Mr. Comey's concurrently filed Motion to Dismiss the Indictment Based on Fundamental Ambiguity and Literal Truth, the Court should dismiss Count One because it rests on fundamentally ambiguous questions. The Supreme Court has made clear that "[p]recise questioning is imperative as a predicate for" a violation of a false-statement statute like Section 1001(a)(2). *See Bronston v. United States*, 409 U.S. 352, 362 (1973) (applying that principle in the context of a perjury prosecution). Accordingly, an "answer to a fundamentally ambiguous question may not, as a matter of law, form the basis for a false statement." *United States v. Mosby*, 143 F.4th 264, 276 (4th Cir. 2025) (citation omitted). Here, the line of questioning that prompted Mr. Comey's allegedly false statements was fundamentally ambiguous because it included confusing compound phrases, alternated between broad and narrow questions, and was riddled with misstated facts.

Despite the basic principle that Section 1001(a)(2) requires the government to prove specific, false answers to specific, precise questions, the indictment does not identify the questions that form the basis for the charge. *See* ECF No. 1 at 1. Nor does it specify which of Mr. Comey's statements is allegedly false. *Id.*

Given that Count One rests on fundamentally ambiguous questions and that the indictment conspicuously omits those questions, there is a significant risk that the government did not explain to the grand jury that it was required to identify specific questions to support Count One. Failure to explain that requirement would constitute a "serious[] misstate[ment] [of] the applicable law" and thus would supply an independent reason to dismiss the indictment. *Stevens*, 771 F. Supp. 2d at 566-67. Indeed, the grand jury's decision to return an indictment by only a two-vote margin shows that any presentation of additional law or facts that was favorable for Mr. Comey likely would have led them not to return an indictment.[8]

B. The Inherently Suspect Procedures That Led to the Indictment Reinforce the Need for Review of the Grand Jury Materials

The highly irregular procedures that led to the indictment increase the risk that the government misstated key legal and factual issues to the grand jury. As a general matter, the departure of a career prosecutor who reportedly determined that there was no probable cause to charge Mr. Comey, the subsequent installation of a White House official with no prosecutorial experience, and the resulting return of an error-ridden indictment by themselves support a finding that "inherently suspect procedures were used before the grand jury." *Nguyen*, 314 F. Supp. at 616. The details of the grand jury proceeding that are currently in the public record reinforce that conclusion.

All available information regarding Ms. Halligan's first-ever grand jury presentation smacks of irregularity. It is virtually unheard of for a brand-new prosecutor to make her first grand jury presentation alone, without the supervision and guidance of an experienced prosecutor to ensure the absence of factual and legal errors. Nevertheless, Ms. Halligan entered the grand jury alone to present a proposed indictment charging Mr. Comey in three counts. That first attempt apparently failed, resulting in a "no true bill" vote by the grand jury. *See* Grand Jury Transcript at 3-6.

Undeterred by her initial failure, Ms. Halligan did not excuse the grand jury for the day. Instead, the grand jury remained at the courthouse into the evening hours to vote on a second indictment that was ultimately returned at 6:47 p.m. *See id.* at 1, 7. That highly unusual decision could have sent the message that the grand jurors would not be permitted to leave unless and until they returned a true bill. And if Ms. Halligan used words to suggest that message, it would further support dismissing the indictment. *See United States v. Breslin*, 916 F. Supp. 438, 442 (E.D. Pa. 1996) (dismissing indictment for prosecutorial misconduct where prosecutor, among other things, made "frequent suggestions to the jury that his assigned time was short"). Even if Ms. Halligan did not expressly deliver that message, the coercive and rushed process that Ms. Halligan employed provides further reason to believe that the grand jury might have been provided with a materially incorrect factual or legal presentation to induce it to indict.

It is also evident from the current record that Ms. Halligan's inexperience affected the grand jury proceedings. She erroneously signed the first indictment she presented—for which the grand jury failed to return a true bill—and then created confusion by presenting two signed indictments to the presiding magistrate. *See* Grand Jury Transcript at 3-5. Her own apparent confusion during the return proceeding supports the inference, combined with the procedural errors in the return process and the factual errors in the indictment, that she failed to give basic instructions to the grand jury and to accurately answer their questions. Although such inexperience alone would not ordinarily satisfy the defense's burden for unsealing grand jury materials, that inexperience must be viewed alongside Ms. Halligan's likely motive to obtain an indictment to satisfy the President's demands, the inaccuracies in the indictment, and the determination of every career prosecutor to consider the case that charges were not warranted.

Taken together, the circumstances surrounding the return of this indictment establish sufficient reason to infer the possibility of prejudicial irregularities to justify disclosure of the materials. That is the type of misconduct that would support dismissal. *See Stevens*, 771 F. Supp. 2d at 566-67. Because "there is grave doubt" whether the grand jury's "decision was free from" the "substantial influence" of that misconduct, the facts here clear the bar for disclosure of grand jury material. *Bank of Nova Scotia*, 487 U.S. at 251.

III. THE POTENTIAL INVASION OF MR. COMEY'S ATTORNEY-CLIENT PRIVILEGE WARRANTS DISCLOSURE OF THE GRAND JURY MATERIALS

Based on a review of the discovery materials produced by the government, it appears that the FBI Special Agent who testified before the grand jury may have been tainted by information covered by the attorney-client privilege. As noted above, the agent's name appears on the indictment return sheet and criminal case cover sheet, ECF No. 7, which in this District typically reflects the name of the agent witness who testifies before the grand jury. The agent's role as a witness raises serious concerns about the misuse of privileged information in the grand jury. The same day the agent apparently testified before the grand jury, he alerted OGC that "[redacted]" ECF No. 89-5 at 2088 (Ex. E). That information apparently related to certain attorneys for Mr. Comey, including Mr. Richman. *See id*. Nevertheless, the agent testified before the grand jury that same day, and given the content of the resulting indictment, it is clear that his testimony must have referenced Mr. Comey's interactions and communications with Mr. Richman. This created a high risk that privileged information was presented to the grand jury by a tainted case agent.

Indeed, OGC's subsequent guidance on September 29, 2025 confirmed as much. OGC directed that any member of the team "[redacted]. ECF No. 89-5 at 2088 (Ex. E). The natural corollary of this guidance would be to similarly preclude any potentially exposed team members from presenting evidence to the grand jury. If OGC was concerned that mere participation [redacted] might taint subsequent process, it follows that a tainted agent's testimony before the grand jury would present a similar if not greater risk of tainting the presentation of evidence with privileged information. Because it appears the agent nevertheless testified before the grand jury on September 25, 2025, there is reason to believe that his testimony may have been tainted by privileged information he reviewed between Mr. Comey and his attorneys, including Mr. Richman.

Thus, disclosure of the grand jury materials is warranted so that the defense can determine whether the government is using privileged information to build its case. If it is, the defense will argue that the Court should take appropriate remedial steps to prevent use of potentially privileged information.

CONCLUSION

For the foregoing reasons, the Court should permit the defense to examine the transcript and audio recordings of the grand jury proceedings in this case, pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(ii).

Dated: October 30, 2025
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of October, 2025, a true copy of the foregoing document was filed electronically through the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Jessica N. Carmichael*
Jessica N. Carmichael

Counsel for Defendant James B. Comey, Jr.

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[1] As discussed in the defense's prior motion to dismiss and *infra*, these reports are corroborated by the absence of any career prosecutor from the September 25, 2025 grand jury presentation that resulted in the indictment charging Mr. Comey in this case, as well as the continued prosecution of this matter, which is handled by prosecutors from a different state and district.

[2] In a previously filed motion, Mr. Comey has separately argued that the indictment should be dismissed because it was secured and signed by an unlawfully appointed official. *See* Mot. to Dismiss Indictment Based on Unlawful Appointment, ECF No. 60.

[3] The custom in this District is for the prosecutor who presented the case to the Grand Jury to sign the indictment along with the U.S. Attorney. Here, only Ms. Halligan signed. ECF No. 1 at 2.

[4] The government designated discovery containing some of the information in these sentences as Protected Materials under the Protective Order in this case. Although the defense sees no reason why this information cannot be made public, out of an abundance of caution, the defense is redacting these sentences from public filing in the first instance.

[5] On October 15, 2025, the government confirmed to the defense that PERSON 1 refers to Hillary Clinton and PERSON 3 refers to Daniel Richman.

[6] For the rest of this brief, references to the exchange between Mr. Cruz and Mr. Comey cite to the Oversight Hearing Video Clip, which provides the most accurate depiction of the exchange. But the Oversight Hearing Transcript is a useful reference as well.

[7] In a concurrently filed motion, Mr. Comey also moves to dismiss Count One both because Senator Cruz's questions were too ambiguous to support a false-statements charge and because Mr. Comey's responses to those questions were literally true. *See* Mot. to Dismiss Indictment Based on Fundamental Ambiguity & Literal Truth. The motion seeks to dismiss Count Two for similar reasons. *Id.*

[8] The same legal flaws would require dismissal of Count Two to the extent it rests on the same fundamentally ambiguous statements. Disclosure of the grand jury materials is also required to ensure that the government does not seek to try Mr. Comey for alleged false or misleading statements that differ from those on which the grand jury was asked to indict. *See Russell v. United States*, 369 U.S. 749, 765 (1962).

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

UNITED STATES OF AMERICA

v.

JAMES B. COMEY, JR.

Defendant.

Criminal No. 1:25-CR-272-MSN

GOVERNMENT REPLY TO DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION FOR IMPLEMENTATION OF FILTER PROTOCOL

The Government has lawfully obtained evidence in its possession. Defendant's purported attorney-client privilege has been asserted for a small subset of that evidence. A filter team is required to determine whether the attorney-client privilege is appropriately asserted as to this subset of evidence.

The Defendant's response [DE 89] demands premature decisions and avoids any meaningful discussion or specific objection to the requested filter protocol. Instead of squarely addressing the proposed filter protocol, the Defendant focuses on unresponsive questions of suppressing underlying warrants and presumed taint. The Court should implement a filter protocol consistent with the government's motion.

ADDITIONAL FACTUAL BACKGROUND

On September 25, 2025, the Defendant was indicted by a federal Grand Jury in the Eastern District of Virginia for making a false statement in violation of 18 U.S.C. § 1001 (Count One) and obstruction of justice in violation of 18 U.S.C. § 1505 (Count Two). Defendant's indictment is based on his testimony to the Senate Judiciary Committee on September 30, 2020, which referenced and incorporated Defendant's testimony to the Senate Judiciary Committee on May 3, 2017.

In 2019 and 2020, the government obtained a series of search warrants during an ongoing investigation into violations of 18 U.S.C. § 641 (Theft and Conversion of Stolen Government Property) and 18 U.S.C. § 793 (Unlawful Gathering or Transmission of National Defense Information). In ways consistent with the current prosecution, the prior government investigation focused in part on the relationship and communication between the Defendant and Daniel Richman ("Richman"). Below is a truncated timeline of events associated with the relevant search warrants.[1]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
- [redacted]
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

As described above, a filter process was in place for each of the warrants where Defendant's prior counsel was able to assert any privilege claims. And Defendant's prior counsel did that through the privilege log provided with the filtered review following the final search warrant.

ARGUMENT

A. A Filter Protocol is Appropriate

Through a prior attorney, Defendant has asserted attorney-client privilege as to specific evidence, i.e., the five text threads identified in the privilege log. "The party asserting a privilege bears the burden of establishing that privilege." *In re Grand Jury Proc., Thursday Special Grand Jury Sept. Term, 1991*, 33 F.3d 342, 352 (4th Cir. 1994). Adjudication of Defendant's asserted privilege requires implementation of a filter protocol. This is the specific issue before the Court based on the government's motion. As described in the initial motion, the government believes that the proposed filter protocol is consistent with case law and appropriately balances government and evidentiary interests against Defendant's potential privilege interests. The remaining evidence lawfully seized under the prior warrants has already been filtered and was provided to the government by Defendant's prior attorney, Richman.

Defendant's response does not address the underlying premise of a filter protocol. Instead, Defendant first jumps to the underlying search warrants and presumptively declares that the government is conducting an unconstitutional search. This is wrong. The government is not asking to look at the raw returns from prior search warrants. The government is simply asking for a judicially approved filter protocol as to a small and specific subset of evidence that was lawfully obtained consistent with the terms of a federal search warrant.

B. The Investigative Team is Not Tainted by Exposure to Attorney-Client Privileged Material

The government has proceeded with an abundance of caution in reviewing lawfully obtained evidence from the 2019 and 2020 search warrants. While reviewing evidence that was previously filtered by the Defendant's attorney, an FBI agent noted that some of the communications appeared to involve an attorney and client. At that time, a prophylactic decision was made to remove the FBI agent from the investigative team and pause any further review of the evidence from the 2019 and 2020 search warrants. This was orally communicated to the investigative team and communicated through written instruction (email) to the lead investigators.

This sequence of events is what the Defendant relies on to assume taint. The presumption is wrong. No members are of the investigative team have been tainted by attorney-client privileged material. However, when undersigned counsel joined the prosecutorial team, a decision was made for the quarantined evidence to remain that way to allow the Court to implement a filter protocol that completely removes any concern. The Defendant questions the government's ability to safeguard privileged material. But the reality is that the government has proceeded with the utmost caution and respect for privileged material.

CONCLUSION

A filter protocol is appropriate to review evidence the Defendant has asserted attorney-client to. This small subset of evidence is derived from a larger set of lawfully obtained evidence that has already been filtered by an attorney for the Defendant. Despite Defendant's assumptions, the government did not violate the defendant's Fourth Amendment rights, nor was the investigative team tainted by reviewing previously filtered evidence. A judicially approved filter protocol is necessary because it is the Defendant's burden to establish his remaining claims of attorney-client privilege.

Respectfully submitted this 2nd day of November, 2025.

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CERTIFICATE OF SERVICE

This is to certify that I have this 2nd day of November, 2025, the government served a copy of the foregoing upon the defendant by CM/ECF to:

Jessica Nicole Carmichael
Counsel for Defendant

Patrick Joseph Fitzgerald
Counsel for Defendant

Respectfully submitted,

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Footnotes

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[1] The timeline and facts below are primarily based on Sealed Gov. Ex. 1. This exhibit is designated as Protected Material because it is a search warrant that, at this time, remains under seal. The government has requested the search warrant be unsealed in the issuing district.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

THE UNITED STATES OF AMERICA,

v.

JAMES B. COMEY JR.,

Defendant.

CRIMINAL NO. 1:25-CR-272-MSN

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT BASED ON VINDICTIVE AND SELECTIVE PROSECUTION

The United States of America, by and through the United States Attorney for the Eastern District of Virginia, hereby responds in opposition to Defendant's motion to dismiss the Indictment based on vindictive and selective prosecution. For the reasons stated herein, Defendant's motion should be denied and this case proceed to trial as the instant prosecution is neither vindictive nor selective.

INTRODUCTION

Defendant James B. Comey, Jr.'s motion to dismiss the indictment based on allegedly vindictive and selective prosecution should be denied. Through a mix of news reports, social-media posts, and speculation, the defendant weaves a tale of what he calls "glaring constitutional violations" that resulted in his indictment for making a false statement to Congress and obstructing a Congressional investigation. Def. Mem., Dkt. No. 59 at 1. The Supreme Court has imposed a demanding standard on defendants arguing a prosecutor brought an indictment for reasons forbidden by the Constitution. Such claims ask courts to exercise judicial power over a "special province" of the Executive and risk unnecessarily impairing the performance of a core executive constitutional function. When the rigorous legal standard is applied to the facts here, it is clear that the defendant has failed to show the Constitution requires the Court to take the extraordinary step of dismissing this case.

The prosecution is not vindictive. The defendant has not produced "direct evidence" of a vindictive motive. And he has not shown that the prosecutor pursued this case "solely to punish" him for exercising his First Amendment rights. So he has not carried his heavy burden of establishing vindictive prosecution.

The prosecution is also not selective. The defendant has not identified similarly situated individuals who were not prosecuted. And he has not provided evidence that the decision to prosecute him was made because of his protected activities. He has not produced the "clear evidence" required for dismissing an indictment based on selective prosecution.

A duly appointed and unbiased prosecutor presented the indictment. And a duly constituted grand jury found probable cause that he committed the indicted offenses. The motion to dismiss and request for discovery should be denied, and the case should proceed to trial.

I. BACKGROUND

A. The defendant's service as FBI Director and the Midyear Exam investigation.

The defendant served as Director of the Federal Bureau of Investigation from September 2013 until May 2017, when the President fired him.

In July 2015, the FBI opened an investigation referred to as the Midyear Exam. The Midyear Exam investigation was focused on former Secretary of State Hillary Clinton's use of a private email server to conduct official government business. The primary crime under investigation was the mishandling of classified information and failure to report the mishandling of classified information. *See* Gov. Ex. 1 at i (July 2018 Department of Justice Office of Inspector General (OIG) Report executive summary).

By the spring of 2016, the defendant "and the Midyear team had determined that, absent an unexpected development, evidence to support a criminal prosecution of Clinton was lacking." *See id.* at iii. The OIG found that, despite having conversations with the then-Deputy Attorney General regarding the joint announcement of a decision to decline criminal prosecution, the defendant "began considering the possibility of an FBI-only public statement in late April and early May 2016. *See id.* at iv. The defendant stated that an FBI-only public statement was "warranted by the '500-year flood' in which the FBI found itself." *See id*. Of note, the timing and presumption that Clinton would eventually be the Democratic Party nominee for President was part of the defendant's decision-making process. *See id.* The defendant eventually "made a conscious decision not to tell [DOJ] leadership about his plans to make a separate statement because he was concerned that they would instruct him not to do it." *See id.* at v. The defendant "concealed his intentions from the [DOJ]" regarding his decision to independently make a declination announcement. *See id*.

On July 5, 2016, the defendant made a public statement in which he "announced that the FBI had completed its Midyear investigation, criticized Clinton and her senior aides as 'extremely careless' in their handling of classified information, stated that the FBI was recommending that the [DOJ] decline prosecution of Clinton, and asserted that 'no reasonable prosecutor' would prosecute Clinton based on the facts developed by the FBI during its investigation."[1] *See id.* at vi. The OIG determined that the defendant's "decision to make this statement was the result of his belief that only he had the ability to credibly and authoritatively convey the rationale for the decision to not seek charges against Clinton, and that he needed to hold the press conference to protect the FBI and the [DOJ] from the extraordinary harm that he believed would have resulted had he failed to do so." *See id.*

But, just two months later in September of 2016, an unrelated investigation out of the FBI's New York Field Office discovered potentially thousands of new emails relevant to Midyear Exam. *See id.* at vi. As a result, on October 28, 2016, the defendant sent a letter to the chairmen of various Congressional committees regarding the newly discovered information and the possible relevance to Midyear Exam. *See* Gov. Ex. 2 (Oct. 28, 2016 letter). He wrote that the FBI would "take appropriate investigative steps designed to allow investigators to review these emails to determine whether they contain[ed] classified information, as well as to assess their importance to [the FBI's] investigation." *Id*.

B. The defendant's correspondence with Daniel Richman—and Richman's correspondence with the press—regarding the Midyear Exam investigation.

After the defendant sent the October 2016 letter the defendant emailed extensively with Daniel Richman, a Columbia Law School professor who also served as an FBI Special Government Employee since 2015.[2] Much of the correspondence occurred via the defendant's use of a personal email account and Mr. Richman's use of an email account associated with Columbia University.

For example, one day after the defendant sent the October 28 letter, Mr. Richman emailed the defendant regarding the letter. Mr. Richman wrote: "*Make sure you keep your eyes shut*. The country can't seem to handle your finding stuff." Gov. Ex. 4 (Oct. 29, 2016 emails) (emphasis added). The defendant[3] replied: "Thanks for the battling you have done against unreason. This is a strange time. B[u]t we press on." *Id.*

The next day, Mr. Richman sent the defendant an email regarding an op-ed he had been asked to write for *The New York Times* about the defendant's letter. Gov. Ex. 5 (Oct. 30, 2016 emails). Mr. Richman stated that he was "not inclined" to "write something," but that he would "do it" if the defendant thought it would "help things to explain that [the defendant] owed cong absolute candor," and that the defendant's "credibility w cong w[ould] be particularly important in the coming years of threatened cong investigations." *See id.* The defendant responded: "No need. At this point it would [be] shouting into the wind. Some day they will figure it out. And as [Individual 1 and Individual 2] point out, my decision will be one a president elect Clinton will be very grateful for (although that wasn't why I did it)." *See id.*

The defendant appears to have reconsidered that view shortly thereafter. On November 1, 2016, he emailed Mr. Richman, stating:

> When I read the times coverage involving [Reporter 1], I am left with the sense that they don't understand the significance of my having spoke about the case in July. It changes the entire analysis. *Perhaps you can make him smarter.*
>
> Let's imagine the Times had a policy against writing new articles close to elections if the articles might influence the election. Consistent with that policy they would avoid writing this week if sources told them that the FBI was looking at Huma Abedin's emails.
>
> But let's imagine that they wrote a very high profile piece in July that sources lead them to now conclude was materially inaccurate. Would they correct it or stay silent because they have a policy to avoid action near elections?
>
> I suspect they would quickly conclude that either course is an "action" and the choices are either reporting or concealing but there is no longer a "neutral" option because of the reporting in July. I also suspect they would resolve very quickly to choose the action of disclosing because to remain silent is to actively mislead, which has a wide range of very bad consequences.
>
> *Why is this so hard for them to grasp?* All the stuff about how we were allegedly careful not to take actions on cases involving other allegations about which we have never spoken is irrelevant. I love our practice of being inactive near elections. But inactivity was not an option here. The choices were act to reveal or act to conceal.

See Gov. Ex. 6 (Nov. 1–2, 2016 emails) (emphases added).

Mr. Richman responded the next day, stating: "This is precisely the case I made to them and thought they understood. I was quite wrong. Indeed I went further and said mindless allegiance to the policy (and recognition that more evidence could come in) would have counseled silence in july to let hrc twist in the wind." *See id.* Mr. Richman emailed the defendant shortly thereafter, writing, "Just got the point home to [Reporter 1]. Probably was rougher than u would have been." *See id.*

The defendant emailed Mr. Richman shortly thereafter, entitling the message "Pretty good" and sending a link to a *New York Times* piece regarding the defendant's purported options in late October 2016 concerning the Clinton email investigation (Midyear Exam). *See* Gov. Ex. 7 (Nov. 2, 2016 email chain); Matt Apuzzo and Sergio Peçanha, *These Are the Bad (and Worse) Options James Comey Faced*, N.Y. Times (Nov. 2, 2016).[4] The defendant wrote: "*Someone showed some logic.* I would paint the cons more darkly but not bad." *See* Gov. Ex. 7 (emphasis added). Mr. Richman responded: "See I *can* teach." *See id.* The defendant replied: "*Well done my friend.* Who knew this would. E so uh fun."[5] *See id.* (emphasis added).

Similarly, in April 2017, the defendant emailed Mr. Richman apparently regarding a lengthy article in *The New York Times*—in which Mr. Richman was a named source—regarding the Clinton email investigation (Midyear Exam). *See* Gov. Ex. 8 (Apr. 23, 2017 email chain). The defendant wrote that he had "read [t]he piece. Thanks so much for your words and tell [Reporter 1] he did a good job. Would be different if I wrote it but it is by and large fair." *See id.* Mr. Richman replied: "You're ever so welcome. And will do re [Reporter 1]. Any badly or under-developed points for me to work on with the New Yorker? Or just the usual." *See id.*

Consistent with the above-described correspondence, Richman corresponded extensively with members of the media regarding or on behalf of the defendant, including in an anonymous capacity.

For example, in February 2017, Richman emailed Individual 3, a then-government official who had served in high-ranking positions at the FBI and DOJ. Mr. Richman wrote: "Hi [Individual 3] - my pal at the NYT, [Reporter 1] is (along with [Reporter 2], [Reporter 3], and (gag me) [Reporter 4]) is doing a huge piece on the HRC emails. *He's had a ton of background conversations with players and non-players (like me).* [Reporter 1] very much would like to talk to you exclusively on background as he tries to understand[] Jim's decision making to the extent possible. [Reporter 1] asked me to reach out to you. Hence this email. Would you be willing to chat with him?" *See* Gov. Ex. 9 (Feb. 11, 2017 email chain) (emphasis added). Individual 3 replied in the affirmative and stated that he would "reach out" to the reporter. *See id.*

Mr. Richman also corresponded with Reporter 1 via text message shortly after the defendant's termination as FBI Director. Over a period of days beginning on May 11, 2017, the pair texted:

> REPORTER 1: And wanted to push you to push JBC. My sense from his texts is that he wants this to spill.
>
> RICHMAN: OK. You text him and I will reach out too. Just ask for the approx [date] and clearance for me to talk as anon source
>
> ***
>
> REPORTER 1: When you reach out to him tell him that you just need for him to allow you to talk. work your magic
>
> ***
>
> REPORTER 1: This is the message I sent him [the defendant]
>
> REPORTER 1: I don't want to bother you as I wait to hopefully learn more about this tease. I do think you deserve to be left to catch your breath but we're at too important a time in the story and the country's history for me to leave you alone. I have to try and throw everything I can against the wall. Questions of your unwillingness to give the president your loyalty are already out there. You don't even need to talk to me. Just give Richman green light to tell me about dinner. That's all..
>
> ***
>
> RICHMAN: Just got goahead [*sic*]. See my email
>
> ***
>
> RICHMAN: A source close to jim is now telling you that jim very much looks forward to giving public testimony before congress (vs the closed testimony sought next week)
>
> ***
>
> REPORTER 1: Turn off your phone
>
> REPORTER 1: I'm going to put this in a story and then tweet it out and people may start bothering you
>
> REPORTER 1: Sleep well
>
> RICHMAN: Ok. But I'm just an unnamed associate, right? Nite nite
>
> REPORTER 1: Yes yes

See Gov. Ex. 10 (May 2017 text messages).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	
v.	**Criminal No. 1:25-CR-272-MSN**
JAMES B. COMEY, JR.	
Defendant.	

APPEAL OF MAGISTRATE JUDGE'S ORDER TO DISTRICT COURT

The government appeals the Magistrate Judge's November 5, 2025, oral order directing the government to produce grand jury materials to the defendant by 5:00 pm on November 6, 2025.[1] The order exceeds the scope of the Magistrate Judge's delegated authority and was entered without the necessary findings that the defendant has shown particularized and factually based grounds exist for disclosure and that the need for disclosure outweighs the long-established public interest in grand jury secrecy. The government respectfully requests that the Court vacate the Magistrate Judge's order or, in the alternative, stay the order pending consideration of the parties' briefing and oral argument on the defendant's Motion to Disclose Grand Jury Proceedings, Dkt. No. 106.

I. BACKGROUND

On October 13, 2025, the government moved for Implementation of Filter Protocol seeking approval of a filter protocol to govern its handling and disclosure of potentially privileged material. Dkt. No. 38.[2] The defendant opposed the motion on October 27, 2025. Dkt. No. 71. In his response in opposition, he asked the Court to "direct the government to disclose" five categories of information related to the protocol, none of which related to grand jury materials. *Id.* at 12.

On October 29, 2025, the Court noted that "briefing on the government's proposed filter protocol raises several legal questions that must be resolved before any protocol is authorized." Dkt. No. 102 at 2. Citing the government's motion and the defendant's response, Dkt. Nos. 38 & 71, the Court appointed a Magistrate Judge "to preside over all proceedings related to the potential review of privileged materials in this case" and directed the Magistrate Judge "to promptly schedule a hearing to address these matters." Dkt. No. 102 at 1–2.

On October 30, 2025, the defendant filed a Motion and Memorandum in Support of Motion to Disclose Grand Jury Proceedings. Dkt. No. 106. In it, he "requests that the Court direct the government to disclose the transcripts and audio recordings of all proceedings before the grand jury in this case" under Federal Rule of Criminal Procedure 6(e)(3)(E)(ii). *Id.* at 1. He argues, in part, that disclosure is required because "the agent who served as a witness in the proceedings may have been exposed to Mr. Comey's privileged communications with his attorneys and thus may have conveyed that information to the grand jury." *Id.*

Under the Court's scheduling order entered on October 8, the government's response to the Motion to Disclose Grand Jury Proceedings is due on November 13, 2025. Dkt. No. 19. The defendant's reply is due on November 20. *Id.* And a hearing has been set for December 9. *Id.* Nonetheless, during his November 5 hearing on the filter protocol, the Magistrate Judge *sua sponte* ordered the government to produce "all grand jury materials" to the defendant by close of business on November 6.

II. ARGUMENT

The Magistrate Judge's disclosure order is contrary to law in two important respects. First, it exceeded the scope of the Magistrate Judge's designated authority and prematurely disposed of a motion pending before this Court. Second, it was entered without the required findings that particularized and factually based grounds exist and that the defendant's need for disclosure outweighs the public interest in grand jury secrecy. The Court should vacate the Magistrate Judge's order or, in the alternative, stay the order pending consideration of the parties' briefing and oral argument on the defendant's pending Motion to Disclose Grand Jury Proceedings.

Under Federal Rule of Criminal Procedure 59(a), a "district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense." Fed. R. Crim. P. 59(a); *see also* 28 U.S.C. § 636(b)(1)(A) ("a judge may designate a magistrate judge to hear and determine" pretrial matters pending before the court). After the magistrate judge "enter[s] on the record an oral or written order," a "party may serve and file objections to the order within 14 days." Fed. R. Crim. P. 59(a). "The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous." *Id.* "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *In re Eli Lilly & Co.*, 580 F. Supp. 3d 334, 337 (E.D. Va. 2022) (quotation marks omitted).

The "long-established policy of maintaining the secrecy of grand jury proceedings" is codified in Federal Rule of Criminal Procedure 6(e). *United States v. Penrod*, 609 F.2d 1092, 1096 (4th Cir. 1979). The Rule provides just "three circumstances in which a court may lift the veil of secrecy." *United States v. Loc Tien Nguyen*, 314 F. Supp. 2d 612, 615 (E.D. Va. 2004). And the defendant's motion for disclosure relies on only one: Rule 6(e)(3)(E)(ii), which allows a court to authorize disclosure of a grand-jury matter "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." *See* Dkt. No. 106 at 1.

The exception in Rule 6(e)(3)(E)(ii) "is not an invitation to engage in a fishing expedition to search for grand jury wrongdoing and abuse when there are no grounds to believe that any wrongdoing or abuse has occurred." *Loc Tien Nguyen*, 314 F. Supp. 2d at 616. "Because grand jury proceedings are entitled to a presumption of regularity, a defendant seeking disclosure of grand jury information under Rule 6(e)(3)(E)(ii) bears the heavy burden of establishing that *particularized and factually based* grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment." *Id.* (quotation marks omitted, emphasis added). "[T]he desire to investigate whether any grand jury impropriety has occurred is insufficient to rebut the strong presumption of regularity in grand jury proceedings." *Id.* at 617.

In deciding whether to release grand jury materials, courts must "balance the petitioner's need for release against the traditional public interest reasons for grand jury secrecy." *United States v. Eury*, No. 1:20-cr-48, 2021 WL 276227, at *12 (M.D.N.C. Jan. 27, 2021). And "only in those cases where the need for disclosure outweighs the public interest in secrecy will the requirement of particularized need for release be found to exist." *Id.* "Due to the heavy burden facing [the] defendant, grand jury testimony will be denied in all but extraordinary circumstances." *United States v. Harris*, No. 5:07-cr-22, 2007 WL 1724298, at *5 (N.D.W.V. June 14, 2007).

The disclosure order exceeds the scope of the Magistrate Judge's authority and improperly disposes of the defendant's pending Motion for Grand Jury Disclosure before the Court. The Court appointed the Magistrate Judge "to preside over all proceedings related to the potential review of privileged materials." Dkt. No. 102 at 2. But neither the government's Filter Protocol motion nor the defendant's response discussed a need for grand jury materials. Instead, the defendant separately filed a Motion to Disclose Grand Jury Proceedings laying out several alleged bases for disclosure of grand jury materials under Rule 6(e)(3)(E)(ii). Dkt. No. 106. That motion was not referred to the Magistrate Judge. And it has not yet been fully briefed. The Magistrate Judge's disclosure order improperly and prematurely resolved a motion pending before the Court. It is contrary to law and should be vacated. *See* Fed. R. Crim. P. 59(a).

The disclosure order is also contrary to law because it was entered without making the necessary finding that the defendant carried his "heavy burden of establishing that 'particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment.'" *See Loc Tien Nguyen*, 314 F. Supp. 2d at 616. And, assuming the defendant did make that showing, the Magistrate Judge failed to conduct the required analysis of whether the defendant's need for disclosure outweighs the public interest in secrecy. *See Eury*, No. 1:20-cr-48, 2021 WL 276227, at *12 (M.D.N.C. Jan. 27, 2021). Rule 6(e) "lays out a general rule of secrecy followed by a set of carefully considered exceptions that limit the district court's authority to disclose the records of a grand jury's proceedings." *Pitch v. United States*, 953 F.3d 1226, 1234 (11th Cir. 2020) (en banc). The Magistrate Judge entered the disclosure order without conducting the legal analysis required to ensure compliance with the Rule. The order should be vacated.

III. CONCLUSION

The disclosure order exceeds the scope of the Magistrate Judge's delegated authority, prematurely resolves a motion still pending before this Court, and was entered without the necessary findings required by law. The government respectfully requests that the Court vacate the order or, in the alternative, stay the order pending full briefing and oral argument on the defendant's Motion to Disclose Grand Jury Proceedings, Dkt. No. 106.

Respectfully submitted this 6th day of November, 2025.

Lindsey Halligan
United States Attorney

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CERTIFICATE OF SERVICE

This is to certify that I have this 6th day of November, 2025, the government served a copy of the foregoing upon the defendant by CM/ECF to:

Jessica Nicole Carmichael
Counsel for Defendant

Patrick Joseph Fitzgerald
Counsel for Defendant

Rebekah Donaleski
Counsel for Defendant

Respectfully submitted,

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Footnotes

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[1] A written order pursuant to the Magistrate Judge's oral order at the November 5 hearing has not been entered on the docket.

[2] On October 19, 2025, the government moved to expedite ruling on its motion for implementation of a filter protocol. Dkt. No. 54. The following day, the defendant filed a response in opposition to an expedited ruling, requesting the full 14 days to file a response. Dkt. No. 55.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,

v.

JAMES B. COMEY, JR.,

Defendant.

Criminal No. 1:25-cr-272-MSN

ORDER

This matter comes before the Court on the government's appeal of Magistrate Judge William E. Fitzpatrick's November 5, 2025 Order (ECF 161) requiring the government to file with the Court, under seal, grand jury materials and produce the same to Defendant by 5:00 p.m. on November 6, 2025. ECF 164. The government contends that Judge Fitzpatrick exceeded his designated authority, prematurely disposed of Defendant's pending Motion for Disclosure of Grand Jury Proceedings (ECF 106) ("Disclosure Motion"), and failed to make the "required findings that particularized and factually-based grounds exist and that the defendant's need for disclosure outweighs the public interest in grand jury secrecy." ECF 164 at 3. The government thus asks that the Court either vacate Judge Fitzpatrick's Order or stay the order pending full briefing and oral argument on Defendant's Disclosure Motion. ECF 164 at 6.

Judge Fitzpatrick's Order regarding the disclosure of the grand jury materials falls within the matter referred to him by this Court. By Order of this Court, Judge Fitzpatrick was designated to "preside over all proceedings related to the potential review of privileged materials in this case." ECF 102. This Court finds that Judge Fitzpatrick's ruling falls within the ambit of this referral. Indeed, the topic of a potential privilege spill was raised by Defendant in both his opposition to the government's motion to expedite the ruling on the filter protocol motion, ECF 55 at 3, and in his opposition to the motion for a filter protocol, ECF 71 at 6. Subsequently, during Judge Fitzpatrick's hearing on the filter protocol motion, Defendant raised substantial questions regarding whether this material was shown to the grand jury. As a result, Judge Fitzpatrick properly addressed the need for disclosure of the grand jury transcripts.

Accordingly, it is hereby

ORDERED that the matter of disclosure of the grand jury transcripts to the Defendant is remanded to Judge Fitzpatrick for further proceedings to analyze whether there are particularized and factually based grounds for disclosure.

IT IS SO ORDERED.

/s/
Michael S. Nachmanoff
United States District Judge

November 7, 2025
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

THE UNITED STATES OF AMERICA,

v.

JAMES B. COMEY, JR.,

Defendant.

CRIMINAL NO. 1:25-CR-272-MSN

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR BILL OF PARTICULARS

Defendant James B. Comey, Jr. requests that the Court order the Government provide him a bill of particulars, alleging that the "indictment . . . sheds no light on the alleged factual basis for the conduct at the heart of Count One," and that it "provides no information about what statements, or conduct, underlie Count Two." *See* Dkt. 107 ("Def. Mem.") at 1. Despite being provided substantial discovery, he nevertheless requests that he be provided detailed disclosure of the government's evidence, strategy, and legal theories in advance of trial. *See id.* at 3–4.

Contrary to defendant's request, a bill of particulars is not to be utilized as a discovery device. Given that the indictment provides defendant with the essential facts constituting the offenses with which he is charged, the Court should not require the Government to disclose the manner in which it will attempt to prove the charges, the precise manner in which the Government intends to prove that the crimes charged were committed, or to provide the defendant a preview of the Government's evidence or legal theories.

I. BACKGROUND

A. The FBI's Midyear Exam investigation and Defendant's July 2016 statement in which he recommended that the Department of Justice decline prosecution.

As detailed in the Government's response to the defendant's motion to dismiss the indictment based on allegedly vindictive or selective prosecution, the defendant served as Director of the FBI between September 2013 and May 2017. *See* Dkt. 138 at 2.

Beginning in 2015, the FBI conducted an investigation—known as Midyear Exam—regarding whether former Secretary of State Hillary Clinton had committed certain federal crimes while using a private email server to conduct official government business. *See id.* at 2.

By the spring of 2016, the defendant and FBI investigators determined that "evidence to support a criminal prosecution of Clinton was lacking." *See id.* at 2 (cleaned up). The defendant eventually decided to make an independent announcement (while consciously concealing his intention to do so from DOJ leadership) concerning the government's decision to decline to prosecute Clinton. *See id.* at 2–3.

In early July 2016, the defendant made a public statement—without the approval of the DOJ—in which he "criticized Clinton and her senior aides as extremely careless in their handling of classified information" and in which he stated that the FBI was recommending that the DOJ decline to prosecute Clinton. *See id.* at 3.

B. Defendant's October 2016 letter to Congress and his subsequent use of Daniel Richman to shape media coverage regarding the Midyear Exam investigation.

In September 2016, during an unrelated investigation, the FBI's New York Field Office discovered thousands of emails potentially relevant to the Midyear Exam investigation. *See id.* at 4; *see also* Dkt. 138-1 at vii (June 2018 Department of Justice Office of Inspector General Report executive summary).

As a result, in late October 2016, the defendant sent a letter to the chairmen and ranking members of numerous Congressional committees regarding the newly discovered information and its potential relevance to the Midyear Exam investigation. *See* Dkt. 138 at 4; *see also* Dkt. 138-2. In that letter, the defendant stated, among other things, that the FBI would "take appropriate investigative steps designed to allow investigators to review these emails to determine whether they contain[ed] classified information, as well as to assess [the emails'] importance to [the FBI's] investigation." *See* Dkt. 138-2. Almost immediately after sending the above-described letter, the defendant appears to have begun coordinating with Daniel Richman, a Columbia Law School professor who also served as an FBI Special Government Employee since 2015, to respond to resulting media coverage.

On the same day that defendant sent his letter to Congress, he was already coordinating with Richman on the coverage. Richman emailed the defendant: "Wittes and I are spending a lot of time saying your letter means exactly and only what it says. 'Cause we, you know, speak English[.]" Defendant replies, using Gmail, with sensitive non-public investigative details:

> You are both right. And he nailed the position I found myself in. The team comes to me yesterday and says there are over 600,000 email on Weiser's computer and they include 10 years of Huma Abeddin's emails, including emails with HRC and that metadata shows are from the "missing"blackberry domain used for the first months of Secretary Clinin's tenure at state. Appears Huma didn't know all her stuff was backing up to his computer. Imagine what I would have done to my institution if I didn't do both of those things. Not a hard call although I hate having to do it.

Gov. Ex. 1 (Misspellings and grammatical errors appear in original).

Following this email exchange, and two days after the defendant sent the letter to Congress, Richman emailed the defendant, stating that he had been asked by *The New York Times*' "op ed page" to "write something on [the defendant's] letter." *See* Dkt. 138-5. Richman stated that he was "not inclined to do so," but that he would if the defendant thought "it [would] help things to explain that [the defendant] owed cong absolute candor and that [the defendant's] credibility w cong [would] be particularly important in the coming years of threatened cong investigations." *See id.* The defendant responded that there was "[n]o need," that doing so "would [be] shouting into the wind," that they would "figure it out," and that his "decision [would] be one a president elect Clinton [would] be very grateful for (although that wasn't why [he] did it)." *See id.*

Nevertheless, mere days later, and apparently displeased with certain media coverage regarding his letter, the defendant tacitly instructed Richman to further explain his reasoning for sending the letter to a reporter at *The New York Times*. The defendant wrote:

> When I read the times coverage involving [Reporter 1], I am left with the sense that they don't understand the significance of my having spoke about the case in July. It changes the entire analysis. *Perhaps you can make him smarter.*
>
> Let's imagine the Times had a policy against writing new articles close to elections if the articles might influence the election. Consistent with that policy they would avoid writing this week if sources told them that the FBI was looking at Huma Abedin's emails.
>
> But let's imagine that they wrote a very high profile piece in July that sources lead them to now conclude was materially inaccurate. Would they correct it or stay silent because they have a policy to avoid action near elections?
>
> I suspect they would quickly conclude that either course is an "action" and the choices are either reporting or concealing but there is no longer a "neutral" option because of the reporting in July. I also suspect they would resolve very quickly to choose the action of disclosing because to remain silent is to actively mislead, which has a wide range of very bad consequences.
>
> *Why is this so hard for them to grasp?* All the stuff about how we were allegedly careful not to take actions on cases involving other allegations about which we have never spoken is irrelevant. I love our practice of being inactive near elections. But inactivity was not an option here. The choices were act to reveal or act to conceal.

See Dkt. 138-6 (emphasis added).

Richman responded the next day, stating that "[t]his was precisely the case" he had "made to them," that he had "thought they understood," and that he had been "quite wrong." *See id.* Richman noted that he had gone "further and said mindless allegiance to the policy (and recognition that more evidence could come in) would have counseled silence in july to let hrc twist in the wind." *See id.* Richman subsequently emailed the defendant to state that he had "[j]ust got the point home to" the reporter at *The New York Times*, and that he "[p]robably was rougher than" the defendant "would have been." *See id.*

The same day, apparently following Richman's communication with *The New York Times*, the defendant emailed Richman a link to a *New York Times* piece regarding the defendant's purported choices in late October 2016 regarding the Clinton email investigation. *See* Dkt. 138-7. The defendant entitled his email "Pretty good," and wrote: "*Someone showed some logic.* I would paint the cons more darkly but not bad." *See id.* (emphasis added). Richman responded: "See I *can* teach." *See id.* The defendant replied: "*Well done my friend.* Who knew this would. E so uh fun." *See id.* (emphasis added).

C. The defendant in May 2017 denied in Senate testimony having authorized anyone at the FBI to be an anonymous source in news reports, and in September 2020 he reaffirmed that testimony.

Despite the defendant's above-described November 2016 instruction to Richman—and his subsequent expression of approval regarding Richman's provision of information to the media concerning the Clinton email investigation—the defendant testified as follows in early May 2017 during an oversight hearing conducted by the Senate Judiciary Committee.

> SENATOR GRASSLEY: Director Comey, have you ever been an anonymous source in news reports about matters relating to the Trump investigation [the FBI's Crossfire Hurricane investigation] or the Clinton investigation?
>
> COMEY: Never.
>
> SENATOR GRASSLEY: Question two on relatively related, have you ever *authorized someone else at the FBI to be an anonymous source in news reports about the Trump investigation or the Clinton investigation*?
>
> COMEY: No.

See Dkt. 138 at 9 & n.6 (emphasis added; "Senator" added).

In September 2020, during another hearing conducted by the Senate Judiciary Committee, the defendant—after swearing an oath before his testimony to tell "the truth, the whole truth, and nothing but the truth"—reaffirmed his May 2017 testimony as follows to Senator Cruz.[1]

> SENATOR CRUZ: All right. Let's shift to another topic. On May 3, 2017 in this committee, Chairman Grassley asked you point blank 'have you ever been an anonymous source in news reports about matters relating to the Trump investigation or the Clinton investigation?' You responded under oath 'never.' He then asked you 'have you ever authorized someone else at the FBI to be an anonymous source in news reports about the Trump investigation or the Clinton administration.' You responded again under oath, 'no.'
>
> Now, as you know, Mr. McCabe, who works for you, has publicly and repeatedly stated that he leaked information to The Wall Street Journal and that you were directly aware of it and that you directly authorized it. Now, what Mr. McCabe is saying and *what you testified to this committee cannot both be true*; one or the other is false. *Who's telling the truth*?
>
> COMEY: I can only speak to my testimony. *I stand by what, the testimony you summarized that I gave in May of 2017*.
>
> SENATOR CRUZ: So, your testimony is *you've never authorized anyone to leak*. And Mr. McCabe if he says contrary is not telling the truth, is that correct?
>
> COMEY: Again, I'm not going to characterize [McCabe's] testimony, but *mine is the same today*.

See Dkt. 138 at 11–12 & n.9 (emphases added; "Senator" added); *see also* Def. Motion to Dismiss at 18, Dkt. 105 (acknowledging that Senator Cruz asked defendant to "*affirm or deny* prior testimony" (emphasis added)).[2]

During the same September 30, 2020 hearing, the defendant was asked by Senator Graham whether he remembered being "getting" or being "taught" of "a[n] investigatory lead from the intelligence community" regarding "U.S. presidential candidate Hillary Clinton's approval of a plan concerning U.S. presidential candidate Donald Trump and Russian hackers hampering U.S. elections as a means of distracting the public from her use of a private email server," *i.e.*, the conduct that the FBI investigated during the Midyear Exam investigation. *See* Dkt. 138-14 at 1. The defendant replied that that information "d[idn't] ring any bells with [him]." *See id.* He similarly informed Senator Hawley that he did not "remember" receiving the investigatory referral, or "anything described" therein. *See id.* at 5. The government has nevertheless determined that the defendant's handwritten notes appear to show that he was informed in September 2016 regarding an "HRC plan to tie Trump." *See* Dkt. 138 at 14–15; *see also* Dkt. 138-13.

D. The indictment.

On September 25, 2025, a federal grand jury returned a two-count indictment charging the defendant with violations of 18 U.S.C. § 1001(a)(2) and 18 U.S.C. § 1505 based on his September 2020 Congressional testimony. *See* Indictment, Dkt. 1.

Count One of the Indictment charges the defendant with falsely stating on or about September 30, 2020 to a U.S. Senator—*i.e.*, Senator Cruz—that he had not authorized Richman to be an anonymous source in news reports regarding the Clinton email investigation, all in violation of 18 U.S.C. § 1001(a)(2). *See id.* Count Two of the indictment charges the defendant with having corruptly endeavored on or about September 30, 2020 to influence, obstruct, and impede the due and proper exercise of the power of inquiry under which an investigation was being held by the Senate Judiciary Committee by making false and misleading statements before that committee, all in violation of 18 U.S.C. § 1505.

E. Discovery provided to the defense to date.

The defense has made discovery requests of voluminous materials. To date, the government has provided broad discovery to the defense (Bates 1–32936) which includes electronic data, investigative summaries, emails, previous hearing transcripts, and witness interviews. The discovery produced, which is more fulsome than required at this stage, sets forth the identity of witnesses and their statements. The government has also provided significant classified discovery to the defense.

II. ARGUMENT

A. The Federal Rules of Criminal Procedure require that an indictment be a plain, concise, and definite written statement of the essential facts of the offense charged.

The Federal Rules of Criminal Procedure provide that an indictment "must be a plain, concise, and definite written statement of the *essential facts* constituting the offense charged." Fed. R. Crim. P. 7(c)(1) (emphasis added).

"An indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Brandon*, 298 F.3d 307, 310 (4th Cir. 2002) (cleaned up); *see also, e.g.*, *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Wicks*, 187 F.3d 426, 427 (4th Cir. 1999) (noting that such an "indictment meets the guarantees of the Fifth and Sixth Amendments"); *United States v. Smith*, 44 F.3d 1259, 1263–64 (4th Cir. 1995).

"Usually an indictment is sufficient if it alleges an offense in the words of the statute, as long as the words used in the indictment fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence." *Brandon*, 298 F.3d at 310 (cleaned up); *see also Smith*, 44 F.3d at 1263 (noting that "[t]he allegations of an offense are generally sufficient if stated in the words of the statute itself"). "However, simply parroting the language of the statute in the indictment is insufficient. When the words of a statute are used to describe the offense generally, they must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *See Brandon*, 298 F.3d at 310 (cleaned up).

Nevertheless, it is plain that an indictment need not "enumerate every possible legal and factual theory of [a defendant's] guilt." *United States v. Am. Waste Fibers Co.*, 809 F.2d 1044, 1047 (4th Cir. 1987).

B. A defend bill of particulars should not be used as a discovery device and a court should not grant a bill of particulars so as to require the government to disclose to the defense its legal strategy, a preview of its evidence, or its legal theories.

"A bill of particulars is appropriate when an indictment fails to (1) provide adequate information to allow a defendant to understand the charges, and (2) avoid unfair surprise." *United States v. Currie*, 2011 WL 1527014, at *1 (D. Md. Apr. 20, 2011). "[A] bill of particulars is generally only required where the charges in an indictment are so general that they do not advise the defendant of the specific acts of which he is accused," and "a defendant is not entitled to a bill of particulars as a matter of right." *See id.*; *see also, e.g.*, *United States v. Brown*, 2011 WL 6046370, at *4 (E.D.N.C. Dec. 5, 2011). "[T]he decision to grant a bill of particulars rests within the sound discretion of the trial court." *Currie*, 2011 WL 1527014, at *1.

Consequently, it is clear that a "bill of particulars is not a discovery device," *United States v. Willock*, 696 F. Supp. 2d 536, 540 (D. Md. 2010), and a "bill of particulars is not to be used to provide detailed disclosure of the government's evidence in advance of trial." *United States v. Auto. Med. Labs, Inc.*, 770 F.2d 399, 405 (4th Cir. 1985) (emphasis added). "The Government may not be compelled to provide a bill of particulars disclosing the manner in which it will attempt to prove the charges, the precise manner in which the defendant[] committed the crimes charged, or a preview of the Government's evidence or legal theories." *United States v. McComber*, 2021 WL 5760731, at *6 (D. Md. Dec. 3, 2021) (cleaned up).

Instead, "[a] defendant is only entitled to know those central facts which will enable him to conduct his own investigation of the transactions that resulted in the charges against him." *United States v. Sykes*, 2016 WL 8291220, at *37 (E.D.N.C. Aug. 22, 2016) (cleaned up) (memorandum and recommendation), *memorandum and recommendation adopted*, 2016 WL 6882839 (E.D.N.C. Nov. 22, 2016). "Stated differently, a defendant is not entitled to compel the government to describe in detail the manner in which the crime was committed, thereby forcing the prosecution to fix irrevocably the parameters of its case in advance of trial." *See Sykes*, 2016 WL 8291220, at *37 (cleaned up).

Thus, the "Government is not required to reveal its legal strategy or to go into matters of detail or to lay out its entire case or to state its legal conclusions," *United States v. Lewis*, 1990 WL 11111, at *2 (W.D.N.C. Feb. 5, 1990), since "a defendant is not entitled to know all the evidence the government intends to produce, but only the theory of the government's case." *United States v. Chen*, 2011 WL 332713, at *7 (N.D. Cal. Jan. 29, 2011) (cleaned up). "The ultimate test must be whether the information sought is *necessary*, not whether it is helpful." *United States v. Mitlof*, 165 F. Supp. 2d 558, 569 (S.D.N.Y. 2001) (emphasis added).

C. The government's provision of substantial discovery counsels against granting a motion for a bill of particulars.

Courts are to be "especially reluctant to direct the filing of a bill of particulars when the government has provided the defendant with extensive pre-trial discovery." *United States v. McComber*, 2021 WL 5760731, at *7 (D. Md. Dec. 3, 2021) (cleaned up). If "the indictment—and information provided by the Government through full discovery—is sufficient to enable a defendant to obtain necessary information about the nature of the charges against [him], so that [he] may prepare for trial, a bill of particulars is unnecessary." *United States v. Mosby*, 2022 WL 1120073, at *3 (D. Md. Apr. 14, 2022); *see also, e.g.*, *United States v. Blanchard*, 542 F.3d 1133, 1140 (7th Cir. 2008); *United States v. Amend*, 791 F.2d 1120, 1125 (4th Cir. 1986) (noting that bill of particulars was unnecessary when counsel "prior to trial . . . obtained all necessary information from the government's files"); *United States v. Schembari*, 484 F.2d 931, 935 (4th Cir. 1973); *United States v. Currie*, 2011 WL 1527014, at *1 (D. Md. Apr. 20, 2011) (declining to grant motion for bill of particulars in part because defendants were provided "with extensive discovery that supplement[ed] the allegations in the indictment").

Consequently, "where an indictment is legally sufficient, detailed discovery may obviate the need for a bill of particulars," and "when considering whether to grant a defendant's motion for a bill of particulars, it is appropriate for [a] court to inquire about the information that has already been provided by the government during discovery." *McComber*, 2021 WL 5760731, at *7; *see also, e.g.*, *United States v. Hernandez*, 330 F.3d 964, 975 (7th Cir. 2003).[3]

D. The defendant's motion should be denied, as he has been advised of the specific crimes of which he has been accused, because he is not entitled to a preview of the government's legal theory or trial strategy, and because he has been provided substantial discovery.

The defendant requests—in twelve separate, particularized demands—that the government be required to disclose in exacting detail the manner in which the two crimes charged in the indictment were committed. *See* Def. Mem. at 3–4. But since that type of detailed disclosure of the government's evidence is emphatically not the purpose of a bill of particulars, his motion should be denied.

i. The indictment is more than sufficient to advise the defendant of the acts of which he is accused.

Both counts of the indictment are more than sufficiently clear to permit defendant to "prepare for trial, minimize the danger of surprise at trial, and enable him to plead his acquittal or conviction in bar of another prosecution for the same offense," *United States v. Schembari*, 484 F.2d 931, 934–35 (4th Cir. 1973), since the indictment plainly describes the "central facts" underlying both charges, *United States v. Sykes*, 2016 WL 8291220, at *37 (E.D.N.C. Aug. 22, 2016) (cleaned up) (memorandum and recommendation), *memorandum and recommendation adopted*, 2016 WL 6882839 (E.D.N.C. Nov. 22, 2016), as well as the "elements of the offense[s] charged." *United States v. Brandon*, 298 F.3d 307, 310 (4th Cir. 2002) (cleaned up).

The defendant nevertheless claims that he is entitled to a bill of particulars as to Count One because that count allegedly "fails to provide any detail regarding the factual basis for its claim that Mr. Comey knowingly authorized Mr. Richman to be an anonymous source in news reports regarding the Clinton investigation, including (a) when and how Mr. Comey provided such authorization; (b) what Mr. Comey authorized Mr. Richman to speak to news reporters about; and (c) which news reports included anonymous information from Mr. Richman." Def. Mem. at 6.

But defendant's concise summary of Count One aptly *demonstrates* why he is not entitled to a bill of particulars as to that count. Count One of the indictment charges the defendant with falsely stating on or about September 30, 2020 to a U.S. Senator—*i.e.*, Senator Cruz—that he had not authorized Richman to be an anonymous source in news reports regarding the Clinton email investigation, all in violation of 18 U.S.C. § 1001(a)(2). That straightforward charge does not, contrary to the defendant's claims, require the Government to identify every occasion on which defendant authorized Richman to act as an anonymous source regarding the Clinton investigation, every reporter or media organization with which Richman communicated, or the form of every such communication. *See* Def. Mem. at 3; *see also id.* at 6–8. That is so because a "bill of particulars is not to be used to provide detailed disclosure of the government's evidence in advance of trial," *United States v. Auto. Med. Labs, Inc.*, 770 F.2d 399, 405 (4th Cir. 1985), or to require the government to "disclos[e] the manner in which it will attempt to prove the charges, the precise manner in which the defendant[] committed the crimes charged, or a preview of the Government's evidence or legal theories." *United States v. McComber*, 2021 WL 5760731, at *6 (D. Md. Dec. 3, 2021) (cleaned up). Since that is precisely what defendant has requested as to Count One, his motion for a bill of particulars should be denied as to that count.

Defendant's motion fares no better as to Count Two of the indictment, which charges him with having corruptly endeavored on or about September 30, 2020, to influence, obstruct, and impede the due and proper exercise of the power of inquiry under which an investigation was being held by the Senate Judiciary Committee by making false and misleading statements before that committee, all in violation of 18 U.S.C. § 1505.

Defendant claims that despite being provided "voluminous discovery," he does not "know the substance of the charges asserted by the government," *see* Def. Mem. at 10, given that he testified during a multi-hour hearing in which numerous topics were covered. *See id.* at 9. But, as provided in discovery and via the indictment, the government intends to seek the admission of evidence at trial on this count regarding the defendant's statements to senators during the September 30, 2020, committee hearing. For instance, the defendant's statements to Senators Grassley and Cruz regarding his use of Richman as an anonymous source concerning the Clinton email investigation and his statements to Senators Graham and Hawley regarding his alleged lack of memory concerning the so-called Clinton plan to "tie Trump" to Russia. *See* Dkt. 138-13. That fact, combined with the discovery that has been provided, more than sufficient for defendant's pretrial preparation as to Count Two, since defendant is "not entitled to compel the government to describe in detail the manner in which the crime was committed, thereby forcing the prosecution to fix irrevocably the parameters of its case in advance of trial." *United States v. Sykes*, 2016 WL 8291220, at *37 (E.D.N.C. Aug. 22, 2016) (cleaned up) (memorandum and recommendation).

ii. The defendant's request for a bill of particulars impermissibly seeks to compel the provision of extreme detail regarding the Government's case.

Even if the Court were to determine that the government should provide a bill of particulars in some form, the defendant's request for a bill of particulars inappropriately seeks to compel the Government to provide inordinate detail regarding "the precise manner in which the defendant[] committed the crimes charged." *United States v. McComber*, 2021 WL 5760731, at *6 (D. Md. Dec. 3, 2021) (cleaned up); *see also* Def. Mem. at 3–4.

A "bill of particulars is not a discovery device," *United States v. Willock*, 696 F. Supp. 2d 536, 540 (D. Md. 2010), but, nevertheless, the defendant requests that the government be compelled to provide detailed responses to his twelve-point itemized list of questions regarding "the manner in which [the government] will attempt to prove the charges" and "the precise manner in which the defendant[] committed the crimes charged." *McComber*, 2021 WL 5760731, at *6 (cleaned up); *see also* Def. Mem. at 3–4. That is wholly inappropriate, since a motion for a bill of particulars cannot be utilized to obtain "extremely detailed evidence," *United States v. Chen*, 2011 WL 332713, at *7 (N.D. Cal. Jan. 29, 2011), or a "preview of the Government's evidence or legal theories." *See McComber*, 2021 WL 5760731, at *6 (cleaned up).

The Court should consequently deny defendant's request "to compel the government to describe in detail the manner in which the crime was committed, thereby forcing the prosecution to fix irrevocably the parameters of its case in advance of trial." *See United States v. Sykes*, 2016 WL 8291220, at *37 (E.D.N.C. Aug. 22, 2016) (memorandum and recommendation), *memorandum and recommendation adopted*, 2016 WL 6882839 (E.D.N.C. Nov. 22, 2016).

iii. The Government has produced substantial discovery, and that counsels against granting defendant's motion.

Finally, the significant discovery provided to the defendant strongly militates against the government being required to provide the defendant a bill of particulars, whether in the form requested by the defendant or otherwise. As indicated above, the government has provided broad discovery to the defense which includes electronic data, investigative summaries, emails, previous hearing transcripts, and witness interviews. The discovery produced, which is more fulsome than required at this stage, sets forth the identity of witnesses and their statements.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the defendant's motion for a bill of particulars be denied.

Respectfully submitted this 13th day of November, 2025.

Lindsey Halligan
United States Attorney

_______/S/________________________
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CERTIFICATE OF SERVICE

This is to certify that I have this 13th day of November, 2025, the government served a copy of the foregoing upon the defendant by CM/ECF to:

Jessica Nicole Carmichael
Counsel for Defendant

Patrick Joseph Fitzgerald
Counsel for Defendant

Rebekah Donaleski
Counsel for Defendant

Respectfully submitted,

_______/S/________________________
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Footnotes

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[1] *See, e.g.*, Forbes Breaking News, *Watch The Senate Hearing In Which The DOJ Says James Comey Lied To Congress And Has Thus Charged Him*, https://www.youtube.com/watch?v=rTU3t1lnCao (last visited Nov. 10, 2025) (showing that oath was administered by Senator Graham beginning at 18:31).

[2] The Government's response in opposition to the Defendant's motion to dismiss erroneously omitted the word "the" before the words "Clinton investigation" in quoting Senator Cruz. *See* Dkt. 138 at 11.

[3] "Nevertheless, the government's production of discovery is not determinative. In other words, the production of discovery does not necessarily obviate the need for a bill of particulars." *United States v. Blair*, 2021 WL 424411, at *4 (D. Md. Feb. 5, 2021).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

THE UNITED STATES OF AMERICA,

v.

JAMES B. COMEY, JR.,

Defendant.

CRIMINAL NO. 1:25-CR-272-MSN

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS INDICTMENT

Defendant James B. Comey, Jr.'s motion to dismiss the indictment should be denied. He argues that Count One should be dismissed because Senator Ted Cruz's questions "were fundamentally ambiguous." *See* Dkt. 105 ("Def. Mem.") at 1. But Senator Cruz's questions were not fundamentally ambiguous. To the contrary, as the defendant recognizes, Senator Cruz's questions are susceptible to two interpretations—"narrow and broad." *Id.* at 14 n.5. Picking between those interpretations is the jury's job. *See United States v. Sarwari*, 669 F.3d 401, 407 (4th Cir. 2012). It's "what juries are for." *United States v. Elfenbein*, 144 F.4th 551, 567 (4th Cir. 2025).

The defendant also argues that Count One should be dismissed because his answers to Senator Cruz's questions were literally true. But the literal-truth defense doesn't "apply to an answer that would be true on one construction" of a question "but false on the other." *Sarwari*, 669 F.3d at 407(cleaned up). And the defendant's attempts to explain away his answers as true under the broad interpretation of Senator Cruz's questions are unavailing.

The defendant's arguments to dismiss Count Two fail for the same and additional reasons. The literal-truth defense doesn't apply to the 18 U.S.C. § 1505 violation charged in Count Two. *See United States v. Safavian*, 528 F.3d 957, 968 (D.C. Cir. 2008). In any event, as further outlined in the government's contemporaneously filed response to the defendant's motion for a bill of particulars, the defendant is on sufficient notice that Count Two does not rest solely on the false statements at issue in Count One.

The motion to dismiss should be denied, and the case should proceed to trial.

I. BACKGROUND

In May 2017, the defendant testified in an FBI oversight hearing before the Senate Judiciary Committee. He engaged in the following colloquy with Senator Grassley:

> GRASSLEY: Director Comey, have you ever been an anonymous source in news reports about matters relating to the Trump investigation or the Clinton investigation?
>
> COMEY: Never.
>
> GRASSLEY: Question two on relatively related, have you ever authorized someone else at the FBI to be an anonymous source in news reports about the Trump investigation or the Clinton investigation?
>
> COMEY: No.

See Exhibit B to Mot. to Dismiss Indictment Based on Vindictive & Selective Prosecution, Dkt. No. 59-2 at 4–5. In September 2020, the defendant again testified before the Senate Judiciary Committee. During the defendant's testimony, he engaged in the following colloquy with Senator Cruz:

> CRUZ: All right. Let's shift to another topic. On May 3, 2017 in this committee, Chairman Grassley asked you point blank 'have you ever been an anonymous source in news reports about matters relating to the Trump investigation or Clinton investigation?' You responded under oath 'never.' He then asked you 'have you ever authorized someone else at the FBI to be an anonymous source in news reports about the Trump investigation or the Clinton administration.' You responded again under oath, 'no.'
>
> Now, as you know, Mr. McCabe, who works for you, has publicly and repeatedly stated that he leaked information to The Wall Street Journal and that you were directly aware of it and that you directly authorized it. Now, what Mr. McCabe is saying and what you testified to this committee cannot both be true; one or the other is false. Who's telling the truth?
>
> COMEY: I can only speak to my testimony. I stand by what, the testimony you summarized that I gave in May of 2017.
>
> CRUZ: So, your testimony [is] [] you've never authorized anyone to leak. And Mr. McCabe if he says contrary is not telling the truth, is that correct?
>
> COMEY: Again, I'm not going to characterize [Andy's] testimony, but mine is the same today.

See Exhibit C to Mot. to Dismiss Indictment Based on Vindictive & Selective Prosecution, Dkt. No. 59-3 at 11 ("Oversight Hearing Transcript").

In September 2025, a grand jury charged the defendant with violations of 18 U.S.C. § 1001(a)(2) and 18 U.S.C. § 1505 based on his September 2020 congressional testimony. Indictment, Dkt. No. 1. He has now moved to dismiss the indictment. Def. Mem., Dkt. No. 105.

II. ARGUMENT

A. Senator Cruz's questions were not fundamentally ambiguous.

A question is fundamentally ambiguous when it lacks "a meaning about which men of ordinary intellect could agree," *Sarwari*, 669 F.3d at 407—in other words, when its meaning could not be discerned by a jury. *Cf. Elfenbein*, 144 F.4th at 567 (requiring the question to be "intractable"). When a question is that ambiguous, there is no response to the question that can support a false-statement conviction. That's because, faced with that degree of ambiguity, it is "impossible" for the jury "to know … the meaning of the question and whether a witness intended to make a false response." *United States v. Strohm*, 671 F.3d 1173, 1179 (10th Cir. 2011). That degree of ambiguity is rare, so it's the "exception, not the rule." *See Elfenbein*, 144 F.4th at 566 (citation omitted).

… question and the truthfulness of [the] defendant's answer are best left to the jury." *United States v. Farmer*, 137 F.3d 1265, 1269 (10th Cir. 1998). Indeed, that's "what juries are for." *Elfenbein*, 144 F.4th at 567; *see id.* at 567 n.14 (stating that "'the construction of an arguably ambiguous question …' is a matter for the jury" (quoting *United States v. Harra*, 985 F.3d 196, 216 (3d Cir. 2021))).

Further, in the Fourth Circuit, a defendant's answer doesn't have to be false under every interpretation of an arguably ambiguous question to support a false-statement conviction. *See Sarwari*, 669 F.3d at 407; *see also Elfenbein*, 144 F.4th at 567 n.14. So the fact that a false-statement charge rests on a "particular interpretation" of an arguably ambiguous question is no reason to dismiss the charge. *See* Def. Mem., Dkt. 105 at 7. Instead, when a defendant's answer "is true under one understanding of the question but false under another," the jury "determines whether the defendant knew his statement was false." *Sarwari*, 669 F.3d at 407.

Drawing the line between a fundamentally ambiguous and an arguably ambiguous question "can be somewhat elusive." *See Harra*, 985 F.3d at 209 n.8. To draw the line, many courts—including the Fourth Circuit—ask whether the question lacks a "meaning about which men of ordinary intellect could agree."[1] *See, e.g.*, *Sarwari*, 669 F.3d at 407; *Strohm*, 671 F.3d at 1179; *United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003). Yet even that is an "admittedly slippery category." *Elfenbein*, 144 F.4th at 566. At bottom, the distinction "seems to be" that while an arguably ambiguous question is open to more than one interpretation, "it is also capable … of taking on" one of those interpretations. *See Harra*, 985 F.3d at 209 n.8. Meanwhile, for a fundamentally ambiguous question, "there is no rational basis" to settle on its meaning. *See id.*

Senator Cruz's questions to the defendant were nowhere near fundamentally ambiguous. In fact, the defendant hardly argues otherwise. As the defendant concedes, Senator Cruz asked the defendant to "affirm or deny prior testimony." *See* Mot. for Disclosure of Grand Jury Proceedings, Dkt. No. 106 at 8. In response, the defendant reasserted his prior testimony that he had never authorized someone else at the FBI to be an anonymous source in news reports about the Trump investigation or the Clinton investigation. Now, in his motion, the defendant says that Senator Cruz's questions are susceptible to two interpretations—"narrow and broad." *See* Def. Mem., Dkt. 105 at 14 n.5. Under the narrow interpretation, Senator Cruz asked the defendant only whether he authorized McCabe to be an anonymous source. Under the broad interpretation, Senator Cruz asked the defendant whether he authorized anyone at the FBI to be an anonymous source.

The broad interpretation is the better one. It comports with Senator Cruz's facially broad questions. And it recognizes that Senator Cruz's "preliminary statements" about McCabe were merely confronting the defendant with information that potentially undermined his prior testimony. *See* Def. Mem., Dkt. 105 at 17. Plus, it's clear that the defendant's answers addressed the broad question. He expressly set aside any aspect of Senator Cruz's question dealing with McCabe, stating that he could "only speak to [his] testimony" and he was "not going to characterize [Andy's] testimony." *See* Oversight Hearing Transcript at 11. He then reasserted his broad 2017 testimony, stating that he stood by it and that his testimony was "the same today" as it was then. *See id.*

The alleged ambiguities raised by the defendant do little to obscure this meaning of Senator Cruz's questions. To start, the defendant says that the questions were compound. And he argues that "[w]hen a government official" asks a compound question but "'elicits a single response from the witness, it may be impossible … to know which question the witness believed he was answering.'" Def. Mem., Dkt. 105 at 8 (quoting Linda F. Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. Tol. L. Rev. 397 (2003)).

But "Who's telling the truth?" is not a compound question. *See* Oversight Hearing Transcript at 11. It is an either-or question. To give the question even an appearance of being compound, the defendant must artificially split the question up. *See* Def. Mem., Dkt. 105 at 9. Under that parsing, however, any question could be recast as a compound question. Further, to the extent the question presented an inquiry into the truth of McCabe's statements—or Senator Cruz's description of McCabe's statements—it wasn't a distinct inquiry from the truthfulness of the defendant's prior testimony. Instead, at most, it was an inquiry into a *subset* of the defendant's prior testimony. But raising an inquiry into a subset of a broader inquiry doesn't take away the broader inquiry.

For example, in *United States v. Castner*, the "examiner asked [the defendant] whether he had received the information from 'somebody else … like Ricky or David themselves.'" 203 F.3d 823, 2000 WL 103070, at *1 (4th Cir. 2000) (unpublished table decision). Yet singling out "Ricky or David" for special consideration did not mean "the examiner's question was … limited to Ricky or David." *Id.* The same is true here. By highlighting one potential way in which the defendant's prior testimony could have been untruthful—*i.e.*, by authorizing McCabe to be an anonymous source—it didn't limit the broader scope of Senator Cruz's question as to whether the defendant's prior testimony was truthful. Plus, even if Senator Cruz's questions were truly compound questions that raised distinct inquiries, it isn't "impossible … to know which question the witness believed he was answering." *See* Harrison, *supra* at 405. It is perfectly clear which question the defendant was answering. He expressly declined to address McCabe's testimony and adopted the unequivocal denial that he had previously provided.

The "other ambiguities" do no more to obscure the meaning of Senator Cruz's questions. *See* Def. Mem., Dkt. 105 at 14. The defendant flags Senator Cruz's mistaken use of "Clinton administration" instead of "Clinton investigation." *See* Oversight Hearing Transcript at 11. Yet Senator Cruz had correctly referred to the "Clinton investigation" two sentences prior and he was recounting the defendant's own testimony, so the mistake would have been obvious to the defendant. *See id.* Indeed, notwithstanding the mistake, the defendant reaffirmed his prior testimony without qualification. So the defendant appears to have fully comprehended the meaning of Senator Cruz's question despite the mistake. Plus, no reasonable person would think that Senator Cruz was asking the defendant about an administration that "had ceased to exist some 17 years before." *See* Def. Mem., Dkt. 105 at 15. Likewise, the defendant objects to "Senator Cruz's use of the words 'never' and 'ever.'" *Id.* But again, Senator Cruz was recounting the defendant's own testimony, so that wouldn't have "injected additional ambiguity." *See id.* Finally, the defendant argues there "was no reason to assume that [Senator Cruz] was referring to anyone but full-time employees" when he asked about "someone else at the FBI." *Id.* But the defendant's distinction between "full-time employees" and other employees is unmoored from the question's broad phrasing that covered anyone "at the FBI."

In any event, choosing between competing interpretations of Senator Cruz's questions is the jury's role. *See Sarwari*, 669 F.3d at 407. The Court's role is deciding whether "men of ordinary intellect could agree" on the meaning of Senator Cruz's questions. *See id.* They certainly could. And the defendant hardly disagrees. Instead, he argues that Count One must be dismissed because it rests on a "[p]articular [i]nterpretation" of Senator Cruz's questions. *See* Def. Mem., Dkt. 105 at 16. That is, he argues there's no allegation that he gave a false answer under the narrow interpretation of Senator Cruz's questions. Therefore, because the government "does not allege that the defendant's answer was false under every interpretation of the question," *see id.* at 7, he argues that Count One "should be 'stricken.'" *See id.* at 16 (quoting *United States v. Serafini*, 167 F.3d 812, 824 (3d Cir. 1999)).

Yet that is not the law in this circuit. The Fourth Circuit has rejected the view that a "false statement conviction 'could not stand' if a defendant's statement accords 'with a reasonable construction' of the information sought." *See Sarwari*, 669 F.3d at 407 n.3 (quoting *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980)); *see also Elfenbein*, 144 F.4th at 567 n.14 (disavowing the view that "a statement is false, and so supports fraud liability, only if it contradicts *all* reasonable interpretations"). Instead, when a defendant's answer "is true under one understanding of the question but false under another," the jury "determines whether the defendant knew his statement was false." *Sarwari*, 669 F.3d at 407. Therefore, choosing between the narrow and broad interpretations is a decision for the jury, not the Court.

B. The defendant's answers were not literally true.

The defendant argues that Count One should be dismissed because he gave "literally true" answers to Senator Cruz's questions. Def. Mem., Dkt. 105 at 16. But the literal-truth defense is "a narrow one." *Sarwari*, 669 F.3d at 406. "It applies only where a defendant's allegedly false statements were *undisputedly* literally true." *Id.* (cleaned up). That means the defense doesn't apply "in cases in which 'the focus is on the ambiguity of the question asked.'" *See id.* at 407 (quoting *United States v. Boskic*, 545 F.3d 69, 92 (1st Cir. 2008)). And it doesn't apply to "an answer that would be true on one construction of an arguably ambiguous question but false on the other."[2] *See id.* (cleaned up); *see also Smith*, 54 F.4th at 767.

As discussed, Senator Cruz's questions should be understood as asking the defendant to affirm or deny his 2017 testimony, without limiting the scope to McCabe. And the defendant doesn't deny that Senator Cruz's questions could be given this interpretation. *See* Def. Mem., Dkt. 105 at 14 n.5. Therefore, since the literal-truth defense doesn't apply to "an answer that would be true on one construction of an arguably ambiguous question but false on the other," *see Sarwari*, 669 F.3d at 407 (cleaned up), the defense is available to the defendant only if he explains how his answers are literally true under the broad interpretation. His attempted explanations are unavailing.

The literal-truth defense holds that a defendant cannot be guilty of violating § 1001 when his allegedly false statement was "literally true but not responsive to the question asked and arguably misleading by negative implication." *Bronston v. United States*, 409 U.S. 352, 353 (1973);[3] *see Smith*, 54 F.4th at 767 (applying the literal-truth defense to § 1001 offenses). Here, the defendant's answers were false "and require[ ] no resort to implication in determining [their] truth or falsity." *See United States v. Seife*, 948 F.2d 1283, 1991 WL 237924, at *2 (4th Cir. 1991) (unpublished table decision).

Start with the defendant's answer that he stood by his 2017 testimony. He argues that this statement "was truthful regardless of whether that prior testimony was itself truthful." Def. Mem., Dkt. 105 at 18. To be sure, when a defendant accurately confirms that he previously gave certain testimony, that confirmation cannot be false even if the underlying testimony was false. *See United States v. Lighte*, 782 F.2d 367, 374 (2d Cir. 1986). But when, as here, the witness "expresses his agreement with the content of the prior testimony, then the witness is in trouble." Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 Duq. L. Rev. 715, 723–24 n.35 (1998); *see, e.g.*, *United States v. Weissman*, No. S2 94 CR. 760 (CSH), 1996 WL 742844, at *19 (S.D.N.Y. Dec. 20, 1996).

It is hard to imagine testimony that more clearly expresses agreement with prior testimony than the defendant's testimony in this case. To start, Senator Cruz had definitively recounted the defendant's prior testimony before asking a question. So it would be strange to interpret his question as merely asking whether the defendant had given that testimony. Instead, Senator Cruz's question went directly to the truth of the prior testimony. Because the question was "clearly about the underlying facts to the question," it "permits a reasonable juror to draw the conclusion beyond a reasonable doubt that [the defendant] understood that he was speaking to the underlying facts … rather than simply acknowledging that he had in fact previously uttered words to the same effect." *See United States v. DeSalvo*, 797 F. Supp. 159, 172 (E.D.N.Y. 1992).

In response to Senator Cruz's question about the truthfulness of his prior testimony, the defendant testified that he stood by it. That can be interpreted only as an expression of agreement with his prior testimony. *See stand by something*, Cambridge Dictionary (online ed.) ("to continue to believe that something you have said before is still true"), https://dictionary.cambridge.org/dictionary/english/stand-by (last visited Nov. 12, 2025).

The defendant's answer to Senator Cruz's second question went even further. Senator Cruz asked: "So, your testimony [is] [ ] you've never authorized anyone to leak. And Mr. McCabe if he says contrary is not telling the truth, is that correct?" Oversight Hearing Transcript at 11. The defendant answered: "Again, I'm not going to characterize [Andy's] testimony, but mine is the same today." *Id.* The defendant argues that "his statement that his testimony is 'the same today' simply meant that he did not intend to revisit his prior testimony." Dkt. 105 at 18. This defies any reasonable interpretation of the defendant's answer. By stating that his testimony "is the same today," he was freshly reasserting his 2017 testimony. Indeed, there must have actually been 2020 testimony for it to be "the same" as the 2017 testimony. And that testimony was false in 2020 just like it was in 2017.

C. The defendant fails to raise a legitimate reason to dismiss Count Two.

The defendant argues that Count Two should be dismissed for "lack of specificity." *See* Def. Mem., Dkt. No. 105 at 20. However, as outlined in the government's contemporaneously filed response to the defendant's motion for a bill of particulars, the government has provided sufficient information to put the defendant on notice.

The defendant separately argues that "[t]o the extent Count Two rests on the same false statements as Count One, that count should also be dismissed" based on his arguments that Senator Cruz's questions were fundamentally ambiguous and that his answers were literally true. Def. Mem., Dkt. No. 105 at 20. But the literal-truth defense doesn't apply to a § 1505 offense. *See Safavian*, 528 F.3d at 968; *see also United States v. Browning*, 630 F.2d 694, 699 (10th Cir. 1980). That's because "[e]ven a literally true statement may be misleading." *Safavian*, 528 F.3d at 968; *see Browning*, 630 F.2d at 699 ("Literal truth is not the test here."). Likewise, the defendant hasn't established that a fundamentally ambiguous defense applies to a § 1505 offense.

In any event, as outlined in the government's contemporaneously filed response to the defendant's motion for a bill of particulars, Count Two does not rest solely on the false statements at issue in Count One. Count Two also rests on the defendant's statements to Senators Graham and Hawley regarding his alleged lack of memory on the so-called Clinton plan to "tie Trump" to Russia. *See* Exhibit 13 to Resp. to Mot. to Dismiss Indictment Based on Vindictive & Selective Prosecution, Dkt. 138-13.

III. CONCLUSION

The Court should deny the defendant's motion to dismiss the indictment.

Respectfully submitted this 13th day of November, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2025, I filed the foregoing motion with the Clerk of Court via the CM/ECF system, thereby causing it to be served upon all counsel of record.

Respectfully submitted,

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Footnotes

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inappropriately intrudes on the role of the jury. The question for the Court is whether people *could* agree on an interpretation of Senator Cruz's questions. If they could agree, then the question as to whether people *would* agree gets decided in the jury room. *Cf. Elfenbein*, 144 F.4th at 567.

[2] The defendant phrases the rule this way: "Where a witness's answer is 'not responsive to the question asked,' it cannot serve as the basis for a 'false-statements' charge if it was 'literally true' under *any* interpretation of the question." Def. Mem., Dkt. 105 at 16–17 (emphasis added) (quoting *United States v. Smith*, 54 F.4th 755, 767 (4th Cir. 2022)). That is correct only if *any* is understood to mean *every*.

[3] Bronston (who was the sole owner of a company) had a personal bank account in Switzerland between October 1959 and June 1964. *See Bronston*, 409 U.S. at 353–54. After the company petitioned for bankruptcy, he was asked in a 1966 bankruptcy hearing whether he had "ever" had "any bank accounts in Swiss banks," and he responded that "[t]he company had an account there for about six months." *See id.* at 354. So Bronston's answer *was* literally true—the company had in fact had such an account—but unresponsive and misleading by negative implication, since it was "addressed to the company's assets and not to his own—thereby implying that he had no personal Swiss bank account at the relevant time." *See id.* at 355.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

THE UNITED STATES OF AMERICA,

v.

JAMES B. COMEY, JR.,

Defendant.

CRIMINAL NO. 1:25-CR-272-MSN

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISCLOSE GRAND JURY MATERIALS

Defendant James B. Comey, Jr.'s Motion to Disclose Grand Jury Proceedings, Dkt. No. 106, should be denied. As explained below, and in the government's Additional Briefing on Disclosure of Grand Jury Materials, Dkt. No. 172, the defendant is not entitled to lift the veil of secrecy protecting the grand jury's work.

Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) allows for disclosure of grand jury material when a defendant "shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." The defendant alleges that "multiple constitutional violations" and a "highly irregular procedure" led to his indictment, giving rise to a "reasonable inference of irregularities before the grand jury." Def. Mem., Dkt. No. 106 at 1, 10. But those claims are not about "matter[s] that occurred before the grand jury." And they are based only on speculation and surmise—not the required objective evidence showing there were grand jury irregularities. Rule 6(e) does not allow disclosure of secret grand jury material to a defendant relying on unsubstantiated allegations of grand jury manipulation to further his search for evidence that might bolster motions to dismiss based on grounds unrelated to grand jury proceedings.[1] The motion for disclosure should be denied.

I. BACKGROUND

On October 13, 2025, the government moved for implementation of a filter protocol to govern its handling and disclosure of potentially privileged material. Gov't Mot., Dkt. No. 38. The request focused on evidence seized pursuant to D.D.C. search warrants issued in a related investigation in 2019 and 2020. The defendant opposed the motion. Def. Resp. in Opp., Dkt. No. 71. In doing so, he claimed that lead case agents "may have been exposed to attorney-client privileged materials." *Id.* at 6. On October 29, 2025, the Court appointed United States Magistrate Judge William E. Fitzpatrick "to preside over all proceedings related to the potential review of privileged materials in this case." Order, Dkt. No. 102 at 1–2.

On October 30, 2025, the defendant filed the pending Motion and Memorandum in Support of Motion to Disclose Grand Jury Proceedings. Def. Mem., Dkt. No. 106. In it, he "requests that the Court direct the government to disclose the transcripts and audio recordings of all proceedings before the grand jury in this case" under Rule 6(e)(3)(E)(ii). *Id.* at 1. He raises three purported grounds for disclosure: that "the indictment arises from multiple constitutional violations," which "support a reasonable inference of irregularities before the grand jury"; that "the circumstances surrounding the return of the indictment in this case indicate that the government may have misstated key factual and legal issues to the grand jury"; and that "the agent who served as a witness in the proceedings may have been exposed to Mr. Comey's privileged communications with his attorneys and thus may have conveyed that information to the grand jury." *Id.*

During a November 5 hearing on the filter protocol before Judge Fitzpatrick, the government explained that an agent recently reviewing digital data from one of the 2019 and 2020 D.D.C. warrants observed a conversation that might have "involved attorney-client confidences." 11/5/25 Tr. at 12:23–13:6. The agent "immediately stopped" his review and alerted supervisors, and no further review has occurred. *Id.*; *see also* Aff., Dkt. Nos. 172-1 & 172-2.

The defense stated that it was unknown whether the information seized under the 2019 and 2020 warrants had undergone a responsiveness review. *Id.* at 19:9–14. And defense counsel argued that, if the government had accessed "both the nonresponsive and responsive set," it "clearly" would have violated the Fourth Amendment. *Id.* at 20:11–19. Judge Fitzpatrick asked defense counsel, "What information do you need that you don't have in order to file a motion to properly challenge the original search, the continued use?" *Id.* at 23:14–16. Counsel responded that, among other things, they needed to know, "What does the government have now? What did they access and provide to the grand jury? . . . Where did they get those materials?" *Id.* at 24:17–20. Judge Fitzpatrick ordered the government to produce "all grand jury materials" to the defense by 5:00 pm the next day. *Id.* at 26:21–22.

The government appealed the disclosure order. Appeal, Dkt. No. 164. And the Court remanded the matter to Judge Fitzpatrick "for further proceedings to analyze whether there are particularized and factually based grounds for disclosure." Order, Dkt. No. 167 at 2.

In briefing before Judge Fitzpatrick, the defendant asserted that there were "[c]oncerns about taint arising from the improper use of potentially privileged and unconstitutionally-obtained materials" and argued that he needed access to grand jury material to determine whether "tainted and improperly obtained materials were presented to the grand jury." Def. Resp. to Order, Dkt. No. 171 at 2 & n.2. The government argued that Rule 6(e) does not permit the defendant to access grand jury material so he can search for grounds that might support a motion to suppress or to dismiss based on alleged Fourth Amendment and privileged violations. Gov't Resp. to Order, Dkt. No. 172 at 1. It argued the defendant had not carried his heavy burden of showing particularized, factually based evidence that a ground may exist to dismiss the indictment based on a matter that occurred before the grand jury. *Id.* And it asserted that, even if the defendant could prove the government violated the Fourth Amendment or attorney-client privilege in its grand jury presentation, neither error could be a basis to dismiss the indictment, so neither could be a basis for disclosing grand jury material under Rule 6(e). *Id.* Nonetheless, the government proposed that Judge Fitzpatrick undertake *in camera* review of the grand jury testimony to confirm that the defendant's claims are baseless. *Id.*

On November 10, Judge Fitzpatrick ordered the government to produce, for *in camera* review, "all materials relating to the September 25, 2025 grand jury proceedings, including complete audio recordings and transcripts reflecting (i) all testimony presented to the grand jury and (ii) any statements made by any prosecutor, law enforcement officer, or witness to the grand jury, or in the presence of the grand jury." Order, Dkt. No. 177 at 1–2. The government complied the same day. Dkt. No. 179. Judge Fitzpatrick also allowed the defendant to file an *ex parte* submission to assist the Court in its review of the grand jury material. Order, Dkt. No. 177 at 2.

II. ARGUMENT

The government has provided Judge Fitzpatrick the grand jury transcript and audio recording for *in camera* review to aid his determination of whether the defendant's Fourth Amendment and privilege claims show particularized and factually based reasons for disclosure.[2] Rule 6(e) does not permit any further disclosure of grand jury material.

"The veil of secrecy that protects grand jury proceedings is well-established, as is the sensible rationale for such secrecy." *United States v. Nguyen*, 314 F. Supp. 2d 612, 615 (E.D. Va. 2004) (citing *Douglas Oil Co. of California v. Petrol Stops Nw.*, 441 U.S. 211, 218 (1979)). "It has long been established that the indispensable secrecy of grand jury proceedings must not be broken except where there is a compelling necessity, and such necessity must be shown with particularity." *United States v. Ramirez*, --- F. Supp. 3d ----, 2025 WL 3019248, at *16 (C.D. Cal. 2025) (quotation marks omitted).

Rule 6(e) codifies the "long-established policy of maintaining the secrecy of grand jury proceedings." *United States v. Penrod*, 609 F.2d 1092, 1096 (4th Cir. 1979); *see also* Fed. R. Crim. P. 6(e). The Rule permits disclosure of grand jury material in specific, limited circumstances. The defendant relies on only one: Rule 6(e)(3)(E)(ii), which allows courts to authorize disclosure of a grand jury matter "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii).

A defendant moving for disclosure under Rule 6(e)(3)(E)(ii) must demonstrate that "particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment." *Nguyen*, 314 F. Supp. 2d at 616 (collecting cases). This is a "heavy burden," given that "grand jury proceedings are entitled to a strong presumption of regularity." *Id.* (citing *Hamling v. United States*, 418 U.S. 87 (1974)). The burden cannot be satisfied with "conclusory or speculative allegations of misconduct." *Id.* (quotation mark omitted). And grand jury disclosure requests "will be denied in all but extraordinary circumstances." *United States v. Harris*, No. 5:07-CR-22, 2007 WL 1724298, at *5 (N.D.W.Va. June 14, 2007).

Importantly, "the desire to investigate whether any grand jury impropriety has occurred is insufficient to rebut the strong presumption of regularity in grand jury proceedings." *Nguyen*, 314 F. Supp. 2d at 617. "A contrary rule would eviscerate the shield of secrecy protecting grand juries." *Id.* If a defendant "proffers no evidence or basis to believe that any grand jury irregularity or impropriety exists, disclosure of grand jury matters is wholly unwarranted." *See id.*

The defendant's vague and unsubstantiated allegations of irregularity—which are primarily focused on events that occurred either before or after the grand jury proceedings—do not show a particularized need for disclosure. His motion should be denied.

A. Disclosure is not warranted based on alleged constitutional violations that gave rise to the defendant's indictment.

The defendant first requests access to grand jury materials because, he claims, they will "bolster" the arguments made in his motions to dismiss alleging due-process, equal-protection, and Appointments Clause violations. Def. Mem., Dkt. No. 106 at 13–14. But he also argues that those (alleged) constitutional violations raise the "strong possibility" of "irregularities in the grand jury proceedings" that warrants disclosure of grand jury information. *Id.* at 12. So, his argument goes, he gets to see secret grand jury material because constitutional violations occurred. But he also needs to see the grand jury material to show those constitutional violations occurred. This circular logic doesn't square with Rule 6(e)'s high bar for disclosure and should be rejected.

First, the defendant is plainly not seeking grand jury material to prove "a ground may exist to dismiss the indictment *because of a matter that occurred before the grand jury*." *See* Fed. R. Crim. P. 6(e)(3)(E)(ii) (emphasis added). He admits as much. He seeks disclosure because it is "reasonably calculated to provide additional support for [his] argument that he would not have been prosecuted but for President Trump's animus toward [him]." Def. Mem., Dkt. No. 106 at 13. He believes grand jury material will "bolster" his motions to dismiss. *Id.* But those motions are not based on "a matter that occurred before the grand jury." They challenge actions that unquestionably occurred before the grand jury convened to indict him. One is based on the U.S. Attorney's appointment; the other is based on what the defendant believes are the motives for his prosecution. *See* Def. Mot. to Dismiss, Dkt. No. 59 & 60. Even assuming there were merit to those motions, they would not show "that grounds exist to support the proposition that irregularities may have occurred *in the grand jury proceedings*." *See United States v. Naegele*, 474 F. Supp. 2d 9, 10 (D.D.C. 2007) (emphasis added). Rule 6(e) does not allow the defendant to inspect grand jury material in hopes that it will support motions to dismiss based on conduct unrelated to grand jury proceedings.

Second, the defendant has provided no "particularized and factually based grounds" to believe there were grand jury irregularities. He moved to dismiss for vindictive and selective prosecution based on nothing but speculation and innuendo. *See generally*, Govt's Resp. to Mot. to Dismiss, Dkt. No. 138. Now, he stacks conjecture on top of that speculation to baldly assert that, based on the U.S. Attorney's "close, longstanding relationship" with the President, "there is a substantial risk that during her presentation to the grand jury, [she] made statements that would support Mr. Comey's motion to dismiss." Def. Mem., Dkt. No. 106 at 14. His "[s]peculation and surmise as to what occurred during the grand jury proceeding is not a substitute for fact." *United States v. Abcasis*, 785 F. Supp. 1113, 1120 (E.D.N.Y. 1992) (citation modified). And it does not "establish a particularized need" for grand jury material. *United States v. Taylor*, No. 6:21-cr-13, 2022 WL 17585255, at *2 (E.D. Ky. Dec. 12, 2022).

Rule 6(e)(3)(E)(ii) does not permit disclosure of grand jury material to aid the defendant in his search for evidence that might support his motions to dismiss based on matters unrelated to the grand jury proceedings.

B. Disclosure is not warranted based on the allegedly irregular circumstances surrounding the return of the indictment.

The defendant's second argument fares no better. It has two parts. One is that "there is a significant risk that the government did not explain to the grand jury that it was required to identify specific questions to support Count One." Def. Mem., Dkt. No. 106 at 15. The other is that the "highly irregular procedures that led to the indictment increase the risk that the government misstated key legal and factual issues to the grand jury." *Id.* at 16. Neither suffices under Rule 6(e)(3)(E)(ii).

First, the defendant offers no "particularized and factually based" showing to support his theory that the grand jury was misinstructed on the elements of Count One. "To warrant disclosure of grand jury materials on the ground of improper instruction, a defendant must produce an 'objective basis' to believe that the grand jury was improperly instructed." *United States v. Wahib*, 578 F. Supp. 3d 951, 958 (N.D. Ohio 2022). "The mere suspicion that the grand jury may not have been properly instructed is insufficient to establish that [the defendant is] entitled either to dismissal of the indictment or to disclosure of grand jury materials." *Taylor*, 2022 WL 17585255, at *2 (citation modified) (quoting *United States v. Trie*, 23 F. Supp. 2d 55, 62 (D.D.C. 1998)).

The defendant relies on the absence of Senator Cruz's questions from the indictment's text and on his opinion that those questions were "fundamentally ambiguous" to claim that the government may not have adequately explained the law of 18 U.S.C. § 1001(a)(2) to the grand jury. Def. Mem., Dkt. No. 106 at 14–15. But the indictment tracks the statutory language and includes all the elements required to prove a violation of Section 1001(a)(2). *See United States v. Smith*, 54 F.4th 755, 766 (4th Cir. 2022) (listing elements of § 1001 conviction). "Nothing in the indictment suggests that proof of anything less than these elements would be sufficient to find probable cause." *Wahib*, 578 F. Supp. 3d at 958.

To the extent the defendant disagrees with how the indictment was drafted, the language of the indictment "is clearly not instructions to the grand jury," so it cannot be evidence to support a claim that the government misstated the law. *United States v. Invidior Inc.*, No. 1:19-cr-16, 2019 WL 6039969, at *7 (W.D. Va. Nov. 14, 2019). The defendant has not shown a "particularized need" for grand jury materials. *Id*. He has not "alleged exact, well-grounded facts to support" his claim of irregularities, *id.*, or produced the required "objective basis" to believe the jury was misinstructed, *Wahib*, 578 F. Supp. 3d at 958. Instead, he has made "precisely the sort of unsubstantiated, purely speculative allegation that cannot support the very high bar for disclosure."[3] *See United States v. Singla*, 692 F. Supp. 3d 1341, 1366 (N.D. Ga. 2023).

Second, the defendant relies on nothing but "vague allegations, bald assertions of impropriety, [and] speculation about what the grand jury materials may reveal" to support his claim that "highly irregular procedures" infected the grand jury's deliberations and merit disclosure. *See Ramirez*, 2025 WL 3019248, at *16 (quoting *United States v. Giraud*, --- F. Supp. 3d ----, 2025 WL 2416737, at *29 (D.N.J. 2025)). That is insufficient. *Id.*

The defendant asks the Court to assume that the U.S. Attorney "failed to give basic instructions to the grand jury and to accurately answer their questions." Def. Mem., Dkt. No. 106 at 16–17. He points to events that occurred before the grand jury presentation (like the departure of the previous interim U.S. Attorney and the appointment of the indicting U.S. Attorney) and after the grand jury returned a true bill (like the return proceeding) and argues they "support a finding that 'inherently suspect procedures were used before the grand jury.'" *Id.* Even if the Court were to credit his unsupported characterization of those events, it would not show grounds for dismissal "because of a matter that occurred before the grand jury." *See* Fed. R. Crim. P. 6(e)(3)(E)(ii).

So the defendant engages in rank speculation about the grand jury's deliberation. He asserts—without a single cited source—that the U.S. Attorney made the "highly unusual decision" to "not excuse the grand jury for the day" after it initially returned a no true bill, which "could have sent the message that the grand jurors would not be permitted to leave unless and until they returned a true bill." Def. Mem., Dkt. No. 106 at 16. Then, despite repeatedly commenting on how late the grand jury deliberated, *id.* at 1, 7, 16, he surmises that its consideration was "coercive and rushed," *id.* at 17. And that, he claims, gives "reason to believe that the grand jury might have been provided with a materially incorrect factual or legal presentation to induce it to indict." *Id.*

The defendant's story is high on rhetoric but low on fact. Although the grand jury did originally return a "no true bill," the foreperson made clear that it was only as to Count One of the first proposed indictment. Report, Dkt. No. 3; 9/25 Tr., Dkt. No. 10 at 6. That the grand jury stayed to return a two-count indictment after it had already found probable cause on those two counts suggests that it was the grand jury's decision to continue its work—not the prosecutor's. And that it did so after business hours suggests that it engaged in a thoughtful, thorough, deliberative process—not a "coercive and rushed" one. *See* Def. Mem., Dkt. No. 106 at 17. The defendant's "unsubstantiated allegations of grand jury manipulation do not satisfy the 'particularized need' standard." *United States v. Cole*, 755 F.2d 748, 759 (11th Cir. 1985). And his "desire to investigate whether any grand jury impropriety has occurred is insufficient to rebut the strong presumption of regularity in grand jury proceedings." *Nguyen*, 314 F. Supp. 2d at 617. He has not carried his burden under Rule 6(e)(3)(E)(ii).

III. CONCLUSION

The defendant's speculative and unsubstantiated allegations of irregularity do not show that a ground may exist to dismiss the indictment "because of a matter that occurred before the grand jury." Rule 6(e)(3)(E)(ii) does not permit disclosure of grand jury material, and his motion should be denied.

Respectfully submitted this 13th day of November, 2025.

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CERTIFICATE OF SERVICE

This is to certify that I have this 13th day of November, 2025, the government served a copy of the foregoing upon the defendant by CM/ECF to:

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Counsel for Defendant

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Respectfully submitted,

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Footnotes

[1] As explained in the government's earlier briefing, Gov't Resp. to Order, Dkt. No. 172 at 4–10, the defendant's claim that potentially privileged information may have been shared with the grand jury cannot be a basis for disclosing grand jury material under Rule 6(e). Even so, at the government's request, Judge Fitzpatrick has undertaken *in camera* review to resolve this claim.

[2] The government has also provided the grand jury transcript and audio recording to Judge Currie, who found it is "necessary to determine the extent of the indictment signer's involvement in the grand jury proceedings" in resolving the defendant's motion to dismiss based on the allegedly improper appointment of the U.S. Attorney. *See* Order, Dkt. No. 95.

[3] The defendant also suggests that the margin of the grand jury's vote "shows that any presentation of additional law or facts that was favorable for Mr. Comey likely would have led them not to return an indictment." Def. Mem., Dkt. No. 106 at 15. But the government is not required to present evidence that is favorable to the accused, and courts cannot look behind facially valid indictments to "scrutinize[e] the sufficiency of the prosecutor's presentation." *United States v. Williams*, 504 U.S. 36, 51, 54 (1992). The Court should reject the suggestion that the grand jury could not have been properly instructed "because, if it had been, it would not have returned the indictment." *Wahib*, 578 F. Supp. 3d at 961. "[A] motion challenging the indictment is not the appropriate vehicle by which a defendant may contest the truth of the charges against him." *Id.* So it cannot be grounds for disclosing grand jury material under Rule 6(e)(3)(E)(ii).

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,

v.

JAMES B. COMEY, JR.,

Defendant.

Criminal No. 1:25-cr-272-MSN-WEF

MEMORANDUM OPINION

This matter is before the Court to address the narrow issue of whether there are particularized and factually based grounds to justify the disclosure of grand jury materials to the defense pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(ii). For the reasons set forth below, the Court finds the record in this case requires the full disclosure of grand jury materials. In so finding, the Court recognizes this is an extraordinary remedy, but given the factually based challenges the defense has raised to the government's conduct and the prospect that government misconduct may have tainted the grand jury proceedings, disclosure of grand jury materials under these unique circumstances is necessary to fully protect the rights of the accused.

I. Relevant Procedural History

On October 13, 2025, the government moved for implementation of a filter protocol to govern its handling and disclosure of potentially privileged material. ECF 38. The material was seized in 2019 and 2020 pursuant to court authorized warrants in a different district and as part of a separate investigation. *Id.* at 2. The defense opposed the motion, in part, on the grounds that the information the government sought to review was improperly retained after the conclusion of the prior investigation, improperly used in this investigation and the government had already accessed potentially privileged information. ECF 71. Rather than institute a filter protocol, the defense asked the Court to direct the government to disclose information related to the acquisition and prior use of the material it sought to review. *Id.* The defense argued that its "concerns with the government's respect for—and ability to safeguard—the defendant's attorney-client privileged materials are not merely hypothetical" because the lead case agents "may have been exposed to attorney-client privileged materials." *Id.* at 6.

On October 29, 2025, United States District Judge Michael S. Nachmanoff entered an Order finding that "briefing on the government's proposed filter protocol raises several legal questions that must be resolved before any protocol is authorized." ECF 102 at 2. Citing the government's motion and Mr. Comey's response, ECF Nos. 38 and 71, the Court appointed the undersigned "to preside over all proceedings related to the potential review of privileged materials in this case." ECF 102 at 1–2.

On November 5, 2025, the undersigned held a hearing on the government's motion for a filter protocol. Following the hearing, the Court ordered the government to provide the materials subject to the filter review to the defense to give the defense an opportunity to assert any claims of privilege. ECF 161. The Court further ordered the government not to review any of the materials at issue until any privilege disputes have been resolved by the Court. *Id.* The Court then ordered the government to provide additional information to the defense about the circumstances surrounding the search and prior use of the materials at issue, including, at the defense's request, to produce all grand jury materials. *Id.*

The government appealed the Court's order challenging, in part, whether the Court made sufficient particularized findings to support the disclosure of the grand jury materials. ECF 164. District Judge Nachmanoff then remanded the matter to the undersigned to conduct "further proceedings to analyze whether there are particularized and factually based grounds for disclosure" of the grand jury material. ECF 167 at 2.

On November 10, 2025, the parties filed briefs addressing the disclosure of grand jury materials. ECF Nos. 171 and 172. In its brief, the government proposed the Court review the grand jury materials *in camera* to aid its analysis. ECF 172. The same day, November 10, 2025, the Court held a telephonic hearing during which it granted the government's request to provide the grand jury materials to the Court for review. ECF 177. The Court, having considered the briefs of the parties, the oral argument of counsel, and the grand jury materials provided by the government, now sets forth, as the government requested, particularized and factually based grounds supporting the disclosure of the grand jury materials.[1]

II. Legal Standard for Disclosure of Grand Jury Materials

The "long-established policy of maintaining the secrecy of grand jury proceedings" is codified in Federal Rule of Criminal Procedure 6(e). *United States v. Penrod*, 609 F.2d 1092, 1096 (4th Cir. 1979). However, Rule 6(e) provides several exceptions under which a court may authorize disclosure of grand jury materials. *See Gallop v. United States*, 2012 WL 13081725, at *9 (E.D. Va. Jan. 9, 2012) ("The decision whether to order the disclosure of grand jury testimony is within the court's discretion.") (citing *United States v. Foggo*, 595 F. Supp. 2d. 672, 674 (E.D. Va. 2009)). In this case, Mr. Comey seeks access to such materials in order to move for dismissal of the indictment based on alleged irregularities in the grand jury proceedings. ECF 171 at 2. Accordingly, the relevant exception is Rule 6(e)(3)(E)(ii), which permits a court to authorize disclosure "at a time, in a manner, and subject to any other conditions that it directs . . . at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury[.]"

A majority of courts have held that the appropriate standard that a defendant must meet to gain disclosure of grand jury materials under Rule 6(e)(3)(E)(ii) is that of "'particularized need,' borrowed from the standard under the case law applying Rule 6(e)(3)(E)(i)." *See United States v. Naegele,* 474 F. Supp. 2d 9, 10 (D.D.C. 2007) (citing *Ridings v. Department of Justice,* 38 Fed. Appx. 20, 21, (D.C. Cir. 2002) (per curiam) (unpublished) ("Even assuming appellant could invoke Rule 6(e)(3)(C)(ii), his claim nonetheless fails because appellant did not make a 'showing of particularized need' for disclosure of the grand jury transcripts ... The district court properly held that appellant's unsupported assertion that a grand jury did not indict him does not constitute the showing of particularized need required under Fed. R. Crim. P. 6(e)(3)(C)(ii).") (citations omitted); *United States v. Nguyen,* 314 F. Supp. 2d 612, 616 (E.D. Va. 2004) (defendant must show that "particularized and factually based grounds exist . . . [that] may create a basis for dismissal of the indictment."); *United States v. Labate,* 2001 WL 533714 at *20 (S.D.N.Y. May 18, 2001) ("To be entitled to disclosure of grand jury minutes, defendant must make a showing of 'particularized need' that outweighs the strong interest in maintaining the secrecy of grand jury proceedings."); *United States v. Abcasis*, 785 F. Supp. 1113, 1119 (E.D.N.Y. 1992) (defendant "has the burden of asserting that particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment"); *United States v. Broyles*, 37 F.3d 1314, 1318 (8th Cir.1994) (using particularized need standard); *United States v. Puglia*, 8 F.3d 478, 480 (7th Cir.1993) (same); *United States v. Lisinski*, 728 F.2d 887, 893 (7th Cir.1984) (same); *United States v. Dunn*, 2005 WL 1705303 at *1 (S.D.N.Y. July 19, 2005) (same); *United States v. Mazzola*, 183 F. Supp. 2d 195, 197-98 (D. Mass. 2001) (same)).

The Fourth Circuit has held that this "particularized need" inquiry requires the trial court to "balance the petitioner's need for release against the traditional public interest reasons for grand jury secrecy and 'only in those cases where the need for [disclosure] outweighs the public interest in secrecy' will the requirement of 'particularized need' for release be found to exist." *In re Grand Jury Proc. GJ-76-4 & GJ-75-3*, 800 F.2d 1293, 1298 (4th Cir. 1986) (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979)); *United States v. Sells Engineering, Inc*., 463 U.S. 418 (1983)); *see also United States v. Foggo*, 595 F. Supp. 2d 672, 675 (E.D. Va. 2009); *Gallop v. United States*, No. 2:08CR217, 2012 WL 13081725, at *9 (E.D. Va. Jan. 9, 2012).

Courts in this district have made clear that Rule 6(e)(3)(E)(ii) "is not an invitation to engage in a fishing expedition to search for grand jury wrongdoing and abuse when there are no grounds to believe that any wrongdoing or abuse has occurred." *Loc Tien Nguyen*, 314 F. Supp. 2d at 616. Because "grand jury proceedings are entitled to a strong presumption of regularity," a defendant seeking disclosure under Rule 6(e)(3)(E)(ii) bears a "heavy burden" of showing that "particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment." *Id.* (citing *Abcasis*, 785 F. Supp. at 1119; *United States v. Breitkreutz*, 977 F.2d 214, 217 (6th Cir. 1992); *United States v. McKie*, 831 F.2d 819, 821 (8th Cir. 1987); *Lisinski*, 728 F.2d at 893)). "Nor can this burden be satisfied with conclusory or speculative allegations of misconduct." *Id.* (citing *United States v. Morgan*, 845 F. Supp. 934, 941 (D. Conn. 1994); *Abcasis*, 785 F. Supp. at 1119).

III. Factual Background

In 2017, the U.S. Attorney's Office for the District of Columbia ("USAO-DDC") initiated an investigation, referred to by the Federal Bureau of Investigation ("FBI") as Arctic Haze. ECF 71 at 2. This investigation concerned an allegation of unauthorized disclosure of classified information to a New York Times reporter, which appeared in an April 22, 2017 article titled "Comey Tried to Shield the FBI from Politics. Then He Shaped an Election." *Id.* The investigation focused on the article's inclusion of classified information related to one of the factors that influenced Mr. Comey's decision, as then-FBI director, to unilaterally announce the closure of the FBI's investigation into then-Presidential Candidate Hillary Clinton's handling of classified material while she was serving as Secretary of State. *Id.* Daniel Richman, a Columbia Law School professor, personal friend of Mr. Comey, and former Special Government Employee at the FBI during Mr. Comey's tenure as FBI Director, was quoted by name in the article and was the subject of USAO-DDC's investigation. *Id.*

The Richman Search Warrants

In 2019 and 2020, the FBI obtained four warrants authorizing agents to search a hard drive, an iCloud account, an iPad and iPhone belonging to Mr. Richman, as well as two Columbia University email accounts used by Mr. Richman (collectively referred to as "the Richman Warrants").[2] ECF Nos. 89-1 to 89-4. The Richman Warrants authorized agents to search for and seize information created or stored between March 1, 2016 and May 30, 2017 that constituted evidence of violations of 18 U.S.C. § 641 (Theft and Conversion of Stolen Government Property) and 18 U.S.C. § 793 (Unlawful Gathering or Transmission of National Defense Information). *Id.*

The information seized pursuant to the Richman Warrants during the Arctic Haze investigation is at the center of the current dispute between the parties in this case.

The 2019 and 2020 Searches of the Richman Devices as Part of the Arctic Haze Investigation

The record reflects that in 2019 and 2020, the government took modest–and as it turned out ineffective–steps to identify and isolate potentially privileged information contained in the materials seized pursuant to the Richman Warrants. For example, the government permitted Columbia University to review the emails seized from Mr. Richman's Columbia email accounts and withhold private or otherwise sensitive communications. ECF 181 (Defense's *Ex Parte* Under Seal Notice Regarding Grand Jury Materials). The government also provided Mr. Richman and his counsel with an opportunity to review the materials seized from his devices and to assert a privilege over those materials. ECF 38 at 2. The government claims that the documents and communications identified by Columbia University and Mr. Richman as privileged were never reviewed as part of the Arctic Haze investigation. ECF 165 at 11–12.

However, the government never engaged Mr. Comey in this process even though it knew that Mr. Richman represented Mr. Comey as his attorney as of May 9, 2017, and three of the four Richman Warrants authorized the government to search Mr. Richman's devices through May 30, 2017, 21 days after an attorney-client relationship had been formed. ECF Nos. 38 at 2 and 138-11 at 33 (Aug. 2019 Office of the Inspector General Report) (noting that Mr. Comey informed the Office of Inspector General that "the day after his removal, or 'very shortly thereafter,' he retained attorneys Patrick Fitzgerald, David Kelley, and Daniel Richman.").

According to an April 29, 2020 letter from Mr. Richman's then-attorney to the government–produced to the Court *ex parte* by the defense–the Department of Justice informed Mr. Richman that the data it obtained from his iCloud account extended to August 13, 2019, well outside the scope of the warrant and well past the date on which Mr. Richman was retained as Mr. Comey's attorney. ECF 181-6 at 20. The same letter further states that the Department of Justice informed Mr. Richman that it had seized data from Mr. Richman's hard drive that extended to June 10, 2017–again well into the period during which Mr. Richman represented Mr. Comey–despite the warrant (19-sw-182) imposing a temporal limit of April 30, 2017. *Id.*

At the time the Richman Warrants were executed, the government was aware not only that Mr. Richman represented Mr. Comey, but also that he maintained ongoing attorney-client relationships with other individuals, as the FBI materials regarding his resignation from Special Government Employee status noted his intention to represent a defendant in a federal criminal prosecution. *Id.* As a result, when the government obtained the first Richman Warrant in 2019, it was clearly foreseeable that Mr. Richman's devices contained potentially privileged communications with numerous third parties, including Mr. Comey. Nevertheless, in 2019 and 2020, the government made a conscious decision to exclude Mr. Comey from the filter process, even though Mr. Comey, as the client, is the privilege holder, not Mr. Richman. The government's claim at the November 5, 2025 hearing that Mr. Richman, at the time himself the subject of a criminal investigation and represented by separate counsel, was in a position to effectively assert Mr. Comey's privilege is entirely unreasonable.

Of equal concern is whether the government complied with a fundamental requirement of the Fourth Amendment and with the plain language of the warrants that it may seize only those materials specifically authorized by the Court. Under long-standing Fourth Amendment precedent, the government may search for and seize only those materials expressly authorized by the terms of a search warrant issued in connection with specific predicate offenses. *See United States v. Williams*, 592 F.3d 511, 519 (4th Cir. 2010) ("At its core, the Fourth Amendment protects against general warrants that authorize 'exploratory rummaging in a person's belongings . . . by requiring a particular description of the things to be seized.'" (citing *Andresen v. Maryland*, 427 U.S. 463, 480 (1976); *United States v. Nasher-Alneam*, 399 F. Supp. 3d 579, 595 (S.D.W. Va. 2019) ("Given the heightened potential for government abuse of stored electronic data, it is imperative that courts ensure that law enforcement scrupulously contain their searches to the scope of the search warrant which permitted the search in the first place."); *United States v. Schlingloff*, 901 F. Supp. 2d 1101, 1106 (C.D. Ill. 2012) (suppressing evidence where search exceeded scope of warrant because "[a]ny other outcome would be contrary to the intent of the Fourth Amendment that search warrants must describe with particularity the things to be seized, so that a search for specified evidence does not devolve into a generalized search for something entirely different"). This principle, referred to as the Fourth Amendment's particularity requirement, is fulfilled when "the warrant identifies the items to be seized by their relation to designated crimes and when the description of the items leaves nothing to the discretion of the officer executing the warrant." *Williams*, 592 F.3d at 519.

Here, the government was permitted to search all of the Richman materials but authorized to seize only evidence related to violations of 18 U.S.C. § 641 (Theft and Conversion of Stolen Government Property) and 18 U.S.C. § 793 (Unlawful Gathering or Transmission of National Defense Information), both markedly different offenses than those with which Mr. Comey is currently charged.[3]

There is nothing in the record to suggest the government made any attempt to identify what documents, communications or other materials seized from Mr. Richman constituted evidence of violations of 18 U.S.C. § 641 and § 793. To be clear, ensuring that agents and prosecutors seize only those things which a court has authorized is a critical early step in the execution of any warrant and an elemental responsibility of all government agents.

When the undersigned questioned the Assistant United States Attorney currently assigned to this case at the November 5, 2025 hearing, as to how and whether a set of materials responsive to the Richman Warrants was identified and separated from non-responsive materials, he simply said he did not know.[4] ECF 165 at 19–20. Following the hearing, on November 5, 2025, the Court ordered the government to produce to the defense all material seized pursuant to the Richman Warrants "in whatever form it is currently maintained" by 5:00 p.m. on November 6, 2025. ECF 161. Pursuant to that Order, the government provided to the defense the materials seized from the Richman Warrants, but, according to the defense, the manner and format in which the government provided the information did not reflect that the government had seized, reviewed and used only the information responsive to the warrants. ECF 171 at 7 n.4.

This potential failure by the government is even more concerning because the warrant issued on August 27, 2019 (19-sw-182) specifically directed the government to identify what information was responsive to the warrant and instructed "[l]aw enforcement personnel [to] then seal any information that does not fall within the scope of [the warrant] and … not [to] further review the information absent an order of the Court."[5] ECF 89-1.

The government appears to have conflated its obligation to protect privileged information–an obligation it approached casually at best in this case–with its duty to seize only those materials authorized by the Court. This cavalier attitude towards a basic tenet of the Fourth Amendment and multiple court orders left the government unchecked to rummage through all of the information seized from Mr. Richman, and apparently, in the government's eyes, to do so again anytime they chose.[6] The Arctic Haze investigation was closed in September 2021, with no charges filed. The Richman materials sat dormant with the FBI until the summer of 2025, when the Bureau chose to rummage through them again.

The 2025 Search of the Richman Materials as Part of the Investigation into Mr. Comey

By the summer of 2025, the FBI and the United States Attorney's Office for the Eastern District of Virginia (USAO-EDVA) had initiated a criminal investigation into Mr. Comey. ECF Nos. 172-1 and 172-2. As part of the investigation, on September 12, 2025, an FBI agent assigned to the Director's Advisory Team was instructed, apparently with the concurrence of the USAO-EDVA,[7] to review "a Blu-ray disc that contained a full Cellebrite extraction and Reader reports of [Mr. Richman's] iPhone and iPad backups." ECF 172-1.

Inexplicably, the government elected not to seek a new warrant for the 2025 search, even though the 2025 investigation was focused on a different person, was exploring a fundamentally different legal theory, and was predicated on an entirely different set of criminal offenses. The Court recognizes that a failure to seek a new warrant under these circumstances is highly unusual. The Court also recognizes that seeking a new warrant under these circumstances would have required a fresh legal analysis and likely resulted in some delay, a delay the investigative team could not afford given that the statute of limitations would expire in a mere 18 days. *See* 18 U.S.C. § 3282(a).

If a new warrant had been sought by the government and issued by the Court, the Fourth Amendment would have required it to be narrowly tailored, authorizing access only to materials within a limited time frame and relevant to the new offenses under investigation. *See Williams*, 592 F.3d at 519. In addition, any new warrant would have imposed strict procedural safeguards to ensure privileged information was not reviewed by the prosecution team. As a result, the parameters of the 2025 search would inevitably have had a different and much narrower scope than the Richman Warrants. Faced with this prospect, the government chose to unilaterally search materials that were (1) seized five years earlier; (2) seized in a separate and since closed investigation; (3) that were never reviewed to determine whether the seized information was responsive to the original warrants; (4) that were likely improperly held by the government for a prolonged period of time; (5) that included potentially privileged communications; (6) did so without ever engaging the privilege holders; and (7) did so without seeking any new judicial authority.

Having decided to forge ahead under these highly unusual circumstances, the FBI agent conducting the September 12, 2025 search of the disc containing information from Mr. Richman's iPhone and iPad was specifically instructed to seize "conversations between [Mr.] Richman and [Mr.] Comey." ECF 172-1. There appeared to be no precautions in place to avoid the collection of privileged communications. *Id.* The agent conducted the review and printed "the relevant pages," which included multiple conversations involving Mr. Comey and Mr. Richman. *Id.* The reviewing agent then transferred the disc and "the relevant [printed] pages" to a second FBI agent (hereinafter referred to as Agent-2). *Id.* Sometime between September 12, 2025 and September 25, 2025, Agent-2 reviewed the newly seized materials and, not surprisingly, identified communications involving Mr. Comey and Mr. Richman as potentially privileged. ECF 172-2.

The government presented this case to the grand jury on September 25, 2025. ECF 1. The same day, prior to the grand jury presentment, Agent-2 alerted the lead case agent (hereinafter referred to as Agent-3) and an attorney with the FBI's Office of General Counsel that "evidence obtained in the Government's investigation of James Comey may constitute attorney-client privileged or attorney-client confidential information. It is also possible that [the agents] may have obtained evidence that constitutes attorney work-product information."[8] ECF 89-5. Agent-2 gave Agent-3 and the FBI attorney "a limited overview of the [privileged] communications." ECF 172-2.[9] Agent-3, rather than remove himself from the investigative team until the taint issue was resolved, proceeded into the grand jury undeterred and testified in support of the pending indictment. ECF 179. In fact, Agent-3 was the only witness to testify before the grand jury in support of the pending indictment. *Id.* The government's decision to allow an agent who was exposed to potentially privileged information to testify before a grand jury is highly irregular and a radical departure from past DOJ practice.

Only after the government had reviewed the materials seized pursuant to the 2019 and 2020 search warrants, only after FBI agents had personally identified potentially privileged materials, and only after the government obtained an indictment on September 25, 2025, did it seek court approval of a filter protocol for materials the FBI had already reviewed. ECF 38. For reasons that remain unclear, the government waited 31 days from September 12, 2025, the date the FBI began reviewing the materials, and 18 days from September 25, 2025, the date the FBI informed its Office of General Counsel about having been exposed to potentially privileged materials, before seeking court approval of a filter protocol on October 13, 2025. *Id.*

IV. The Court's *in Camera* Review of the Grand Jury Materials[10]

The Court has now reviewed the grand jury transcript, the audio recording of the grand jury proceedings, as well as the exhibits presented to the grand jurors. Only one witness, Agent-3, testified before the grand jury, and only one prosecutor appeared on behalf of the government. ECF 179-1 (Full Grand Jury Indictment Transcript).

The Search and Use of the Richman Materials

The government's position is that the grand jury materials "confirm the baselessness of the defendant's claim that privileged information may have been shared with the grand jury." ECF 172. While it is true that the undersigned did not immediately recognize any overtly privileged communications, it is equally true that the materials seized from the Richman Warrants were the cornerstone of the government's grand jury presentation. The government substantially relied on statements involving Mr. Comey and Mr. Richman in support of its proposed indictment. Agent-3 referred to these statements in response to multiple questions from the prosecutor and from grand jurors and did so shortly after being given a limited overview of privileged communications between the same parties. The government's position that privileged materials were not directly shared with the grand jurors ignores the equally unacceptable prospect that privileged materials were used to shape the government's presentation and therefore improperly inform the grand jurors' deliberations.

Statements of the Prosecutor to the Grand Jury

Having been requested by the government to review the grand jury materials, the Court has identified two statements by the prosecutor to the grand jurors that on their face appear to be fundamental misstatements of the law that could compromise the integrity of the grand jury process. Both statements by the prosecutor are in response to questions by grand jurors and are directly related to communications involving Mr. Comey.

First, after having advised the grand jurors that the prosecutor was their legal advisor (ECF 178-1 at 46), the prosecutor stated:

> "[redacted] …" (ECF 178-1 at 105)

The prosecutor's statement that [redacted] is a fundamental and highly prejudicial misstatement of the law that suggests to the grand jury that Mr. Comey does not have a Fifth Amendment right not to testify at trial. The prosecutor's statement ignores the foundational rule of law that if Mr. Comey exercised his right not to testify the jury could draw no negative inference from that decision. *See Griffin v. California,* 380 U.S. 609, 615 (1965) (holding that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.") The prosecutor's statement that [redacted] may have reasonably set an expectation in the minds of the grand jurors that rather than the government bear the burden to prove Mr. Comey's guilt beyond a reasonable doubt at trial, the burden shifts to Mr. Comey to explain away the government's evidence. See *Victor v. Nebraska*, 511 U.S. 1, 22 (1994) (holding that the Due Process Clause "requires the government to prove a criminal defendant's guilt beyond a reasonable doubt"). In addition, the statement by the prosecutor was made in response to challenging questions from grand jurors, the context of which suggests the grand jurors may have reasonably understood the prosecutor to mean that if she could not satisfactorily answer their questions, then Mr. Comey would "[redacted]" answer these questions at trial.

Second, the prosecutor told the grand jury that there was [redacted] ECF 178-1 at 106. That statement clearly suggested to the grand jury that they did not have to rely only on the record before them to determine probable cause but could be assured the government had more evidence–perhaps better evidence–that would be presented at trial.

Issues Regarding the Completeness of the Grand Jury Transcript and Audio Recording, and the Manner in Which the Second Indictment was Presented to the Grand Jury

Finally, the record is well established that the grand jury was originally presented with a three-count indictment, signed by the prosecutor. ECF 3, 10. The grand jury, however, rejected Count 1 of the original indictment and found probable cause as to the two remaining counts. *Id*. At some point, the prosecutor prepared and signed a second indictment that removed Count 1 of the original indictment. ECF 10, 188-1. At the return of the indictment, the government presented both the first and second indictments to the magistrate judge. ECF 10. The first indictment indicated that the grand jury failed to find probable cause as to any count. ECF 3, 10. The second indictment indicated that the grand jury found probable cause as to two counts. ECF 1, 10. Both indictments were fully executed by grand jury foreperson and the prosecutor. ECF 1, 3, 10. Presented with two facially inconsistent indictments, the magistrate judge questioned the grand jury foreperson and the prosecutor to unwind this procedural knot. *Id*. The magistrate judge then accepted the return of the second signed indictment. *Id*. The second indictment was a new indictment and therefore the undersigned concluded after reviewing the grand jury transcript that the prosecutor would have presented the second indictment to the grand jury for consideration before it was returned in open court. It now appears that may not have happened.

On November 14, 2025, the prosecutor filed a declaration with the Court attempting to address the issue of whether the transcript of the grand jury proceedings filed with the Court was the full and complete transcript. ECF 187-1. The prosecutor stated that after the grand jury was left to deliberate on the first indictment at approximately 4:28 p.m., she had no further contact with the grand jury. The prosecutor further stated that at approximately 6:40 p.m. she was notified by the then-First Assistant United States Attorney that the grand jury returned a true bill on only two of the three counts presented by the government.[11] *Id*. The prosecutor, according to her declaration, then proceeded to the courtroom for the return of the indictment. *Id*. The hearing on the return of the indictment began at approximately 6:47 p.m. ECF 10.

The short time span between the moment the prosecutor learned that the grand jury rejected one count in the original indictment and the time the prosecutor appeared in court to return the second indictment could not have been sufficient to draft the second indictment, sign the second indictment, present it to the grand jury, provide legal instructions to the grand jury, and give them an opportunity to deliberate and render a decision on the new indictment. If the prosecutor is mistaken about the time she received notification of the grand jury's vote on the original indictment, and this procedure did take place, then the transcript and audio recording provided to the Court are incomplete.[12] If this procedure did not take place, then the Court is in uncharted legal territory in that the indictment returned in open court was not the same charging document presented to and deliberated upon by the grand jury. Either way, this unusual series of events, still not fully explained by the prosecutor's declaration, calls into question the presumption of regularity generally associated with grand jury proceedings, and provides another genuine issue the defense may raise to challenge the manner in which the government obtained the indictment.

V. Authority That May Support a Defense Motion to Dismiss

To secure the disclosure of grand jury materials under Rule 6(e)(3)(E)(ii), a defendant must show that "a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." The government argues that the defense has failed to meet its heavy burden to satisfy this standard and even assuming there was a Fourth Amendment violation (or a series of Fourth Amendment violations) or that privileged information was compromised, the most severe remedy available to the defense would be the exclusion of evidence rather than dismissal of the indictment. ECF 172. Indeed, "the validity of an indictment is not affected by the character of the evidence considered." *United States v. Calandra*, 414 U.S. 338, 344–45 (1974); *see also Bracy v. United States,* 435 U.S. 1301, 1302 (1978) (Rehnquist, J., denying stay application) ("[A]n indictment is not invalidated by the grand jury's consideration of . . . evidence obtained in violation of the Fourth Amendment."). Courts have likewise held that the grand jury's consideration of evidence obtained in violation of the attorney–client privilege, on its own, does not constitute grounds for dismissal of an indictment. *See United States v. Colasurdo,* 453 F.2d 585, 596 (2d Cir. 1971); *United States v. Rodolitz*, 648 F. Supp. 430, 432 (S.D.N.Y. 1986) (holding that a motion to dismiss the indictment "based on an alleged violation of . . . the attorney-client privilege before the grand jury must be denied.").

However, the government's claim that this is, at worst, a conventional Fourth Amendment violation and an excusable slippage of privileged communications is unpersuasive, particularly considering the central role this information played in the government's grand jury presentation. It is well established that courts may, and indeed on occasion must, use their supervisory authority to "safeguard the integrity of the grand jury process." *See United States v. Strouse*, 286 F.3d 767, 771 (5th Cir. 2002). The Supreme Court has recognized that a district court may use its supervisory power "to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions.'" *See United States v. Williams*, 504 U.S. 36, 46 (1992) (quoting *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring in the judgment)). The Supreme Court has also recognized that this supervisory power of federal district courts should be used "to implement a remedy for violation[s] of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and finally, as a remedy designed to deter illegal conduct." *United States v. Hasting*, 461 U.S. 499, 505 (1983) (citations omitted).

Accordingly, when prosecutorial misconduct before the grand jury prejudices a defendant and threatens the defendant's right to fundamental fairness in the criminal process, a district court may exercise its supervisory authority to dismiss the indictment. *See United States v. Derrick*, 163 F.3d 799, 807 (4th Cir. 1998) (explaining that the Fourth Circuit has "consistently recognized that an indictment may not be dismissed for prosecutorial misconduct absent a showing that the misconduct prejudiced the defendant). The Supreme Court has held that a defendant who seeks to have an indictment dismissed because of misconduct before the grand jury must show actual prejudice and "establish[ ] that the violation substantially influenced the grand jury's decision to indict' or [that] there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations.'" *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988); *see also United States v. Feurtado*, 191 F.3d 420, 425 (4th Cir. 1999) (applying the standard established by *Bank of Nova Scotia v. United States* and affirming a district court's dismissal of the indictment without prejudice, where the court found that, although the defendants had not shown that improper testimony substantially influenced the grand jury, there remained "some doubt that the grand jury's decision to indict was free from the influence of that testimony"). Here, the procedural and substantive irregularities that occurred before the grand jury, and the manner in which evidence presented to the grand jury was collected and used, may rise to the level of government misconduct resulting in prejudice to Mr. Comey.

VI. Findings by the Court

Based on the foregoing, the Court makes the following findings:

First, the facts establish a reasonable basis for the defense to challenge whether the Richman Warrants were executed in a manner consistent with the Fourth Amendment and the orders of the issuing court.

Second, the facts establish a reasonable basis for the defense to challenge whether the government exceeded the scope of the Richman Warrants in 2019 and 2020 by seizing and preserving information that was beyond the scope of the warrants, that is, information that did not constitute evidence of violations of either 18 U.S.C. § 641 or § 793.

Third, the facts establish a reasonable basis for the defense to challenge whether the government had the lawful authority to search the Richman materials anew in 2025.

Fourth, the facts establish a reasonable basis for the defense to challenge whether the government's 2025 seizure of the Richman materials included information beyond the scope of the original warrants.

Fifth, the nature and circumstances surrounding the government's potential violations of the Fourth Amendment and court orders establish a reasonable basis to question whether the government's conduct was willful or in reckless disregard of the law.

Sixth, the facts provide a reasonable basis for the defense to show that they were prejudiced by the government's use of the Richman materials in the grand jury, particularly if the government's conduct was willful or reckless, given the centrality of these materials to the government's presentation.

Seventh, the facts establish a reasonable basis for the defense to challenge whether the government took sufficient steps to avoid the collection and review of privileged materials, including the reasons why Mr. Comey was never afforded the opportunity to assert a privilege over his communications until after the indictment was obtained.

Eighth, the facts establish a reasonable basis for the defense to challenge whether privileged information was used, directly or indirectly, by the government to prepare and present its grand jury presentation. This is particularly troublesome because the government's sole witness before the grand jury was exposed to a "limited overview" of privileged material shortly before he testified.

Ninth, the nature and circumstances surrounding the disclosure of potentially privileged information establish a reasonable basis to question whether the government's conduct was willful or in reckless disregard of the law. This is particularly significant because Agent-3, after having been exposed to potentially privileged information, chose to testify before the grand jury rather than separate himself from the investigation to contain any further exposure to privileged information and limit any prejudice to Mr. Comey.

Tenth, as discussed in Section IV above the prosecutor made statements to the grand jurors that could reasonably form the basis for the defense to challenge whether the grand jury proceedings were infected with constitutional error.

Eleventh, the grand jury transcript and recording likely do not reflect the full proceedings because, although it is clear that a second indictment was prepared and presented to the grand jury (ECF 3), the transcript and audio recording of the proceedings do not reflect any further communications after the grand jury began deliberating on the first indictment.

Collectively, the facts set forth herein and the particularized findings of the Court establish that "ground[s] may exist to dismiss the indictment because of a matter that occurred before the grand jury[.]" Rule 6(e)(3)(E)(ii). The Court need not now determine whether any facts herein have been proven, or whether there is merit to any motion yet to be filed. That task may lie ahead. Rather, the Court is finding that the government's actions in this case–whether purposeful, reckless, or negligent–raise genuine issues of misconduct, are inextricably linked to the government's grand jury presentation, and deserve to be fully explored by the defense.

VII. Balancing Grand Jury Secrecy and Disclosure to the Defense

Lastly, before ordering disclosure of grand jury materials the Court must balance the secrecy requirements of Rule 6(e) against Mr. Comey's Due Process rights. See *In re Grand Jury Proc. GJ-76-4 & GJ-75-3*, 800 F.2d at 1298. In *United States v. Procter & Gamble Co*., the Supreme Court listed the traditional reasons underlying grand jury secrecy: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." 356 U.S. at 681 n. 6 (quoting *United States v. Rose*, 215 F.2d 617, 628–29 (3d Cir.1954)).

The traditional policies underlying grand jury secrecy are only moderately applicable to this case. Here, the grand jury's role in this case is over and the statute of limitations has expired so there is no danger that release of grand jury materials could impact future grand jury proceedings. The only person to testify before the grand jury was a single federal agent. There are no other "persons who have information with respect to the commission of crimes" who testified before the grand jury, either voluntarily or pursuant to a subpoena. The government has offered no particularized reason why grand jury materials should be kept from the person the grand jury indicted. Mr. Comey was the only person who was the subject of this grand jury proceeding, and Mr. Comey is the only person who is receiving the grand jury information. On the other hand, as the Court has found, these materials are essential if Mr. Comey is to fully and fairly defend himself in the face of the irregularities that have characterized this investigation from its inception.

It is also important to note that the grand jury materials are not being made public, at least not yet. The grand jury materials are being provided to the defense under the terms of a Protective Order (ECF 40) and for the limited purpose of defending this criminal action brought by the government.[13]

For these reasons, the Court finds that the institutional concerns for grand jury secrecy are greatly outweighed by Mr. Comey's right to Due Process.

VIII. Conclusion

The Court recognizes that the relief sought by the defense is rarely granted. However, the record points to a disturbing pattern of profound investigative missteps, missteps that led an FBI agent and a prosecutor to potentially undermine the integrity of the grand jury proceeding. Therefore, in this case, "the Court has before it a rare example of a criminal defendant who can actually make a 'particularized and factually based' showing that grounds exist to support the proposition that irregularities may have occurred in the grand jury proceedings and may justify the dismissal of one or more counts of the indictment." *See Naegele*, 474 F. Supp. 2d at 10 (citations omitted).

Accordingly, the defense request for all grand jury materials is granted.

ENTERED this 17th day of November 2025.

William E. Fitzpatrick
WILLIAM E. FITZPATRICK
UNITED STATES MAGISTRATE JUDGE

Footnotes

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[1] Relatedly, the defense filed a separate motion seeking access to the grand jury materials. ECF 106. The government filed its opposition to that motion on November 13, 2025. ECF 184.

[2] Search warrant 19-sw-182 was issued on August 27, 2019, and authorized the search of Mr. Richman's hard drive from February 1, 2017 to April 30, 2017. ECF 89-1.

Search warrant 19-sc-2097 was issued on October 22, 2019, and authorized the search of Mr. Richman's Columbia University and Law School email accounts from March 1, 2016 to May 30, 2017. ECF 89-2.

Search warrant 20-sw-200 was issued on January 31, 2020, and authorized the search of Mr. Richman's iCloud account from March 1, 2016 to May 30, 2017. ECF 89-3. Attachment B to the warrant specifically limits the information to be seized to "non-privileged communications." *Id.*

Search warrant 20-sw-143 was issued on June 4, 2020, and authorized the search of the backup files for Mr. Richman's iPad and iPhone from March 1, 2016 to May 30, 2017. ECF 89-4. Attachment B to the warrant specifically limits the information to be seized to "non-privileged communications." *Id.*

[3] On September 25, 2025, Mr. Comey was indicted by a federal Grand Jury in the Eastern District of Virginia for making a false statement in violation of 18 U.S.C. § 1001 (Count One) and obstruction of justice in violation of 18 U.S.C. § 1505 (Count Two). The indictment is based on Mr. Comey's testimony to the Senate Judiciary Committee on September 30, 2020, which referenced his testimony to the Senate Judiciary Committee on May 3, 2017. ECF 1.

[4] To be clear, the two assistant United States attorneys currently assigned to this case entered their appearances post-indictment and were not a part of the Arctic Haze investigative team.

[5] This provision is not repeated in the other Richman warrants submitted by the government, but the approach is nevertheless plainly required on the face of each warrant and as discussed *supra*, in accordance with well-established Fourth Amendment precedent.

[6] The Fourth Circuit has held that the government's prolonged retention and continued access to materials that are non-responsive to a search warrant may violate the Fourth Amendment. *See United States v. Zelaya-Veliz,* 94 F.4th 321 (4th Cir. 2024) (holding that district courts "retain[] the authority to determine that prolonged retention of non-responsive data by the government violated the Fourth Amendment.").

[7] It is important to note that the USAO-EDVA prosecutors were not involved in the 2019 and 2020 searches of the Richman materials and may have reasonably assumed the agents in 2019 and 2020 seized and preserved only those materials responsive to the warrants.

[8] This is the language used by an FBI attorney to characterize their September 25, 2025 phone conversation with Agent-3. A second agent, possibly Agent-2, was also on the call but that that person's identity has been shielded from the Court. ECF 89-5.

[9] The government provided no further detail about what, in its view, constitutes a "limited overview."

[10] Specific statements made before the grand jury are redacted. The Court's analysis of those statements is not.

[11] If the Court is to read the prosecutor's declaration as suggesting there was no contact between any government official and the grand jury after 4:28 p.m., then it begs the question of how the then-First Assistant learned that the grand jury had refused to indict on one count, and how the First Assistant knew which count had been rejected by the grand jury, all before the indictment was returned in open court.

[12] It is the responsibility of the United States Attorney's Office to record and, if required, transcribe all grand jury proceedings.

[13] It is also worth noting that those charged with criminal offenses routinely receive at least partial transcripts of grand jury proceedings prior to trial. The government is oftentimes required to provide testimony given before a grand jury to defendants to comply with its discovery obligations under Rule 16 and the Jencks Act, 18 U.S.C. § 3500, or to comply with its constitutional responsibilities in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963) or *United States v. Giglio*, 450 U.S. 150 (1972).

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,

v.

JAMES B. COMEY, JR.,

Defendant.

Criminal No. 1:25-cr-272-MSN-WEF

ORDER

This matter comes before the Court pursuant to United States District Judge Michael S. Nachmanoff's November 7, 2025 Order remanding the matter of disclosure of the grand jury materials to the undersigned for further proceedings to determine whether there are particularized and factually based grounds for disclosure. ECF 167.

For the reasons set forth in the Memorandum Opinion filed concurrently with this Order, the undersigned finds that the Defendant has made a factually based showing of particularized need for the production and inspection of grand jury materials under Federal Rule of Criminal Procedure 6(e)(3)(E)(ii).

Accordingly, it is hereby

ORDERED that, by 3:00 p.m. on November 17, 2025, the Clerk of Court shall make available to the defense all grand jury materials filed on the docket under seal by the government (ECF 179); and it is further

ORDERED that the government shall, no later than 5:00 p.m. on November 17, 2025, produce to the defense the complete audio recording of the grand jury proceedings; and it is further

ORDERED that the Clerk of Court shall file on the public docket the version of the Memorandum Opinion containing narrow redactions of grand jury material; and it is further

ORDERED that the Clerk of Court shall maintain the unredacted version of the Memorandum Opinion under seal until further order of the Court.

ENTERED this 17th day of November, 2025.

William E. Fitzpatrick
WILLIAM E. FITZPATRICK
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA

v.

JAMES B. COMEY, JR.

Defendant.

Criminal No. 1:25-CR-272-MSN

EMERGENCY MOTION TO STAY THE MAGISTRATE JUDGE'S ORDER TO ALLOW TIME FOR THE GOVERNMENT TO FILE ITS OBJECTIONS TO THE ORDER TO THE DISTRICT COURT PURUSANT TO RULE 59

The government files this emergency stay of the Magistrate Judge's November 17, 2025, order, Dkt. No. 193, directing the Clerk of Court to make available to the defense all grand jury materials filed on the docket under seal by the government by 3:00 p.m. and directing the government to produce to the defense the complete audio recording of the grand jury proceedings by 5:00 p.m. on November 17, 2025.

Pursuant to Fed. R. Crim. Pro 59(a), the government "may serve and file objections to the order within 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets." Therefore, the government respectfully requests the Court stay the Magistrate Judge's order pending this Court's consideration of timely objections by the government. *Id.* Although 14 days is contemplated within Rule 59(a), the government only asks to file its objections within one week, November 24, 2025.

I. BACKGROUND

On October 13, 2025, the government moved for Implementation of Filter Protocol seeking approval of a filter protocol to govern its handling and disclosure of potentially privileged material. Dkt. No. 38.[1] The defendant opposed the motion on October 27, 2025. Dkt. No. 71. In his response in opposition, he asked the Court to "direct the government to disclose" five categories of information related to the protocol, none of which related to grand jury materials. *Id.* at 12.

On October 29, 2025, the Court noted that "briefing on the government's proposed filter protocol raises several legal questions that must be resolved before any protocol is authorized." Dkt. No. 102 at 2. Citing the government's motion and the defendant's response, Dkt. Nos. 38 & 71, the Court appointed a Magistrate Judge "to preside over all proceedings related to the potential review of privileged materials in this case" and directed the Magistrate Judge "to promptly schedule a hearing to address these matters." Dkt. No. 102 at 1–2.

On October 30, 2025, the defendant filed a Motion and Memorandum in Support of Motion to Disclose Grand Jury Proceedings. Dkt. No. 106. In it, he "requests that the Court direct the government to disclose the transcripts and audio recordings of all proceedings before the grand jury in this case" under Federal Rule of Criminal Procedure 6(e)(3)(E)(ii). *Id.* at 1. He argued, in part, that disclosure is required because "the agent who served as a witness in the proceedings may have been exposed to Mr. Comey's privileged communications with his attorneys and thus may have conveyed that information to the grand jury." *Id.*

Under the Court's scheduling order entered on October 8, the government's response to the Motion to Disclose Grand Jury Proceedings was due on November 13, 2025. Dkt. No. 19. The defendant's reply is due on November 20. *Id.* And a hearing has been set for December 9. *Id.*

During his November 5, 2025 hearing on the filter protocol, the Magistrate Judge ordered the government to produce "all grand jury materials" to the defendant by close of business on November 6. Dkt. No. 161. On November 6, 2025, the government field an appeal of the magistrate judge's order to this Court. Dkt. No. 164. On November 7, 2025, the Court remanded the issue back to the magistrate judge "for further proceedings to analyze whether there are particularized and factually based grounds for disclosure" of the grand jury materials.

On November 10, 2025, the Magistrate Judge held a telephonic hearing on the issue. Dkt. No.176. The Magistrate Judge requested the government produce, *in camera*, all the grand jury materials, which the government provided to the court by close of business that day, and informed the defendant he could submit any *ex parte* information regarding the grand jury materials by the following day. *Id.*

On November 17, 2025, at 10:38 a.m., the Magistrate Judge ordered "that, by 3:00 p.m. on November 17, 2025, the Clerk of Court shall make available to the defense all grand jury materials filed on the docket under seal by the government (ECF 179); and . . . that the government shall, no later than 5:00 p.m. on November 17, 2025, produce to the defense the complete audio recording of the grand jury proceedings."

II. ARGUMENT

The Magistrate Judge's new order is contrary to law and the government should be allowed to object to the order. Thus, the Court should stay the Magistrate Judge's order pending this Court's consideration of timely objections by the government.

Under Federal Rule of Criminal Procedure 59(a), a "district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense." Fed. R. Crim. P. 59(a); *see also* 28 U.S.C. § 636(b)(1)(A) ("a judge may designate a magistrate judge to hear and determine" pretrial matters pending before the court). After the magistrate judge "enter[s] on the record an oral or written order," a "party may serve and file objections to the order within 14 days." Fed. R. Crim. P. 59(a). "The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous." *Id.* "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *In re Eli Lilly & Co.*, 580 F. Supp. 3d 334, 337 (E.D. Va. 2022) (quotation marks omitted).

The "long-established policy of maintaining the secrecy of grand jury proceedings" is codified in Federal Rule of Criminal Procedure 6(e). *United States v. Penrod*, 609 F.2d 1092, 1096 (4th Cir. 1979). The Rule provides just "three circumstances in which a court may lift the veil of secrecy." *United States v. Loc Tien Nguyen*, 314 F. Supp. 2d 612, 615 (E.D. Va. 2004). And the defendant's motion for disclosure relies on only one: Rule 6(e)(3)(E)(ii), which allows a court to authorize disclosure of a grand-jury matter "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." *See* Dkt. No. 106 at 1.

The exception in Rule 6(e)(3)(E)(ii) "is not an invitation to engage in a fishing expedition to search for grand jury wrongdoing and abuse when there are no grounds to believe that any wrongdoing or abuse has occurred." *Loc Tien Nguyen*, 314 F. Supp. 2d at 616. "Because grand jury proceedings are entitled to a presumption of regularity, a defendant seeking disclosure of grand jury information under Rule 6(e)(3)(E)(ii) bears the heavy burden of establishing that *particularized and factually based* grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment." *Id.* (quotation marks omitted, emphasis added). "[T]he desire to investigate whether any grand jury impropriety has occurred is insufficient to rebut the strong presumption of regularity in grand jury proceedings." *Id.* at 617.

In deciding whether to release grand jury materials, courts must "balance the petitioner's need for release against the traditional public interest reasons for grand jury secrecy." *United States v. Eury*, No. 1:20-cr-48, 2021 WL 276227, at *12 (M.D.N.C. Jan. 27, 2021). And "only in those cases where the need for disclosure outweighs the public interest in secrecy will the requirement of particularized need for release be found to exist." *Id.* "Due to the heavy burden facing [the] defendant, grand jury testimony will be denied in all but extraordinary circumstances." *United States v. Harris*, No. 5:07-cr-22, 2007 WL 1724298, at *5 (N.D.W.V. June 14, 2007).

The government's position is that disclosure of grand jury materials is not warranted under the facts presented to the Magistrate Judge. Indeed, the government believes the Magistrate Judge may have misinterpreted some facts he found when issuing the latest order to release the grand jury materials to the defendant. For instance, whether the defendant has any standing to challenge the Richman materials, the full context of the statements made by the prosecutor to the grand jury, that Agent-3 was exposed to potentially privileged material, and that two indictments were presented to the grand jury. Additionally, the Magistrate Judge acknowledges he "did not immediately recognize any overtly privileged communications." Dkt. No. 192 at 14. The possible exposure of privileged materials to the grand jury was the primary focus of the Magistrate Judge's inquiry. Having seemingly settled that issue, the Magistrate Judge turns to premature issues such as suppression that have not even been briefed by the parties.

III. CONCLUSION

For the reasons stated herein, the government respectfully requests the Court stay the Magistrate Judge's order pending this Court's consideration of timely objections by the government. *Id.* Although 14 days is contemplated within Rule 59(a), the government only asks to file its objections within one week, November 24, 2025.

Respectfully submitted this 17th day of November, 2025.

Lindsey Halligan
United States Attorney

/S/
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CERTIFICATE OF SERVICE

This is to certify that I have this 17th day of November, 2025, the government served a copy of the foregoing upon the defendant by CM/ECF to:

Jessica Nicole Carmichael
Counsel for Defendant

Patrick Joseph Fitzgerald
Counsel for Defendant

Rebekah Donaleski
Counsel for Defendant

Respectfully submitted,

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Footnotes

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[1] On October 19, 2025, the government [illegible] for implementation of a filter protocol. Dkt. No. 54. The [illegible] response in opposition to an expedited ruling, requesting the [illegible] 55.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America,)
)
v.) Case No.: 1:25-CR-00272-MSN
)
James B. Comey, Jr.,)
)
Defendant.)

JAMES B. COMEY, JR.'S OPPOSITION TO MOTION FOR STAY

James B. Comey, Jr., by and through undersigned counsel, respectfully files this opposition to the government's motion to stay Magistrate Judge Fitzpatrick's November 17, 2025 order directing the release of grand jury materials to the defense. ECF No. 195, 193. In a 24-page, thoroughly reasoned opinion based on Judge Fitzpatrick's own review of the grand jury materials along with the parties' briefing and oral argument, Judge Fitzpatrick carefully laid out the particularized grounds for disclosure in this case, and the government proffers no basis to disturb those findings. The motion for a stay should be denied, but to the extent the Court is inclined to grant such a stay, the Court should order an expedited two-day briefing schedule.

In any context, "[a] stay is considered 'extraordinary relief' for which the moving party bears a 'heavy burden.'" *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 558 (E.D. Va. 2016) (citation omitted). And there is "no support for the contention that a magistrate judge's order on a nondispositive motion . . . is automatically stayed upon timely filing of an objection to that order." *Plant v. Merrifield Town Ctr. Ltd. P'ship*, 711 F. Supp. 2d 576, 584 (E.D. Va. 2010). Instead, to determine whether a magistrate judge's order should be stayed pending appeal, the Court must consider the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) whe[re] the public interest lies." *GTSI Corp. v. Wildflower Int'l, Inc.*, No. 09-cv-123, 2009 WL 3245396, at *1 (E.D. Va. Sept. 29, 2009).

The government has not demonstrated that it is likely to succeed on the merits of its appeal. On appeal, "[t]he district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous." Fed. R. Crim. P. 59(a) (emphasis added). "A magistrate judge's order is clearly erroneous only when 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' A magistrate judge's order is contrary to law when the order 'fails to apply or misapplies relevant statutes, case law, or rules of procedure.'" *SageWater, LLC v. Hossfeld*, No. 23-cv-00770-MSN-LRV, 2024 WL 4520646, at *1 (E.D. Va. Oct. 17, 2024) (Nachmanoff, J.) (citing *Attard Indus. v. United States Fire Ins. Co.*, No. 10-cv-121, 2010 WL 3069799, at *1 (E.D. Va. Aug. 5, 2010) (citations omitted)).

Here, Judge Fitzpatrick's opinion carefully and exhaustively reviewed the relevant law, made factual findings, and found that "the procedural and substantive irregularities that occurred before the grand jury, and the manner in which evidence presented to the grand jury was collected and used, may rise to the level of government misconduct resulting in prejudice to Mr. Comey." ECF No. 193 at 20. Finding nine separate bases for believing that the government's extraordinary misconduct may provide a basis to move to dismiss the indictment, Judge Fitzpatrick determined that the need for disclosure was "essential if Mr. Comey is to fully and fairly defend himself in the face of the irregularities that have characterized this investigation from its inception," and that Mr. Comey's Due Process rights "greatly outweighed" the need for grand jury secrecy. *Id.* at 23-24.

The government contends in its motion to stay that Judge Fitzpatrick "may have misinterpreted some facts," including Mr. Comey's "standing to challenge the Richman materials, the full context of the statements made by the prosecutor to the grand jury, that Agent-3 was exposed to potentially privileged material, and that two indictments were presented to the grand jury." ECF No. 195 at 5. Not so. First, Mr. Comey does have standing to move to suppress these materials, as was briefed in this matter. *See* ECF No. 89 at 8 n.6; ECF No. 135 at 3-4. Second, it is difficult to see how Judge Fitzpatrick could "misunderstand" the nature of Ms. Halligan's statements to the grand jury when they "on their face appear to be fundamental misstatements of the law." ECF No. 193 at 15. Further, Judge Fitzpatrick reached these conclusions with the benefit of the full context of Ms. Halligan's interactions with the grand jury, according to her declaration filed on November 14, 2025, ECF No. 188-1 at 1-2. With respect to Agent-3's taint, Judge Fitzpatrick reasonably raised significant concern that Agent-3 proceeded to testify in the grand jury after being provided a "limited overview" (which the government did not explain) by agents who had unquestionably been exposed to privileged materials as a result of their warrantless search and total disregard for Mr. Comey's privilege. *Id.* at 13. Judge Fitzpatrick's conclusion—that the "government ignores the . . . prospect that privileged materials were used to shape the government's presentation and therefore improperly inform the grand juror's deliberations," *id.* at 14-15, fully answers, and renders nonresponsive, the government's observation that Judge Fitzpatrick "did not immediately recognize any overtly privileged communications." ECF No. 195 at 5 (quoting ECF No. 192 at 14). Besides, as Mr. Comey has explained, only the defense is fully in a position to evaluate whether privileged materials were used before the grand jury, making it all the more essential that the grand jury materials be provided to him.

Moreover, with respect to the presentment, the affidavit Ms. Halligan voluntarily presented raised significant concerns about whether the operative indictment was actually presented to the grand jury, and if so, by whom. The logical conclusion from Ms. Halligan's declaration is that no one from the government presented a new indictment to the grand jury after it issued a no bill. Ms. Halligan's declaration attests that *she* did not reappear before the grand jury upon learning of the grand jury's vote to no bill the indictment she presented between 2:18PM and 4:28PM. *See* ECF No. 188-1 at 2 ("During the intermediary time, between concluding my presentation and being notified of the grand jury's return, I had no interaction whatsoever with any members of the grand jury."). And, importantly, she asserts that "the transcript accurately reflects the *entirety* of the government's presentation and presence in front of the grand jury. There was no additional presentation, interaction, or discussion with the grand jury outside of what is reflected in the transcript." ECF No. 188-1 at 1 (emphasis added). If no one from the government presented the operative indictment, as logically follows from Ms. Halligan's own assertions and her ultimate handing up of a purported indictment that differs from the one partially no true billed, then the grand jury did not vote on it. *See* ECF No. 193 at 17-18.

Finally, the government ignores Judge Fitzpatrick's finding that Ms. Halligan misstated two key issues of law to the grand jury. First, he found that Ms. Halligan "suggest[ed] to the grand jury that Mr. Comey does not have a Fifth Amendment right not to testify at trial." ECF No. 191 at 15. Second, he found that Ms. Halligan "clearly suggested to the grand jury that they did not have to rely only on the record before them to determine probable cause but could be assured the government had more evidence—perhaps better evidence—that would be presented at trial." *Id.* at 16. He then made clear that those statements "could reasonably form the basis for the defense to challenge whether the grand jury proceedings were infected with constitutional error." *Id.* at 22. The government has not even attempted to demonstrate why it is likely to succeed in appealing that conclusion. This Court should deny the government's stay motion on that basis alone.

The defendant faces trial in seven weeks on an indictment that the government secured through what appear to be significant and prejudicial constitutional errors that affected Mr. Comey's fundamental rights. The government has had the Richman Warrant materials for more than five years; it knew of the taint and privilege issues caused by its conduct in mid-September 2025, yet delayed for 31 days in raising these issues before the Court on October 13, 2025. ECF No. 193 at 14. The government's severe misconduct before the grand jury in this matter provides an additional basis for Mr. Comey to move to dismiss this deeply flawed indictment; Mr. Comey must have the grand jury minutes to do so. The government should not be permitted to use delay to further frustrate Mr. Comey's constitutional rights—the government's abusive conduct has already unjustifiably prejudiced Mr. Comey and continues to do so each day that he is under the pall of unlawful and unwarranted charges. Each judge who has reviewed these grand jury materials—even without the benefit of informed and necessary guidance by the defense—has raised significant concerns about the government's conduct. It follows, then, that it is even more imperative that the defense be permitted an opportunity to review these materials to identify just how significant the government's misconduct was in securing this indictment and to file an appropriate motion. And with a trial date rapidly approaching, further delay in providing the defense with these materials, pursuant to the protective order, threatens to undermine the speedy and efficient conduct of these proceedings.

It is vital to observe that the government has identified little on its side of the scales. Judge Fitzpatrick enumerated the attenuated basis for claims of grand jury secrecy in this case. ECF No. [illegible]

[illegible]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,

v.

JAMES B. COMEY, JR.,

Defendant.

Criminal No. 1:25-cr-272-MSN

ORDER

This matter comes before the Court on the government's Emergency Motion to Stay. ECF 195. The government seeks to stay the November 17, 2025 Order of Magistrate Judge William E. Fitzpatrick directing the production of grand jury materials to the defense, ECF 193, to allow it to file, and this Court to consider, Rule 59(a) objections to Judge Fitzpatrick's Order. ECF 195.

It is hereby

ORDERED that the Motion (ECF 195) is GRANTED IN PART; and it is further

ORDERED that the government will file any objections to Judge Fitzpatrick's Order by 5:00 p.m. on Wednesday, November 19, 2025. Thereafter, the defense will file any response to any objection by the government by 5:00 p.m. on Friday, November 21, 2025; and it is further

ORDERED that Judge Fitzpatrick's Order (ECF 193) is STAYED pending the resolution of any objections filed by the government, which this Court will consider on the papers.

The Clerk of Court is directed to forward a copy of this Order to counsel of record.

IT IS SO ORDERED.

/s/
Michael S. Nachmanoff
United States District Judge

Michael S. Nachmanoff
United States District Judge

November 17, 2025
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA

v.

JAMES B. COMEY, JR.

Defendant.

Criminal No. 1:25-CR-272-MSN

GOVERNMENT'S OBJECTIONS TO THE MAGISTRATE JUDGE'S ORDER TO RELEASE GRAND JURY MATERIALS TO THE DEFENDANT

To obtain disclosure of grand jury material the defendant must demonstrate that particularized and factually based grounds exist to show that irregularities *in the grand jury proceedings* may create a basis for dismissal of the indictment. *See* Fed. R. Crim. P. 6(e)(3)(E)(ii). While United States Magistrate Judge William E. Fitzpatrick cited that standard, *see* Dkt. No. 191 at 4, the magistrate fundamentally erred by principally relying on information *separate and apart* from the grand jury proceedings in ordering disclosure. Accordingly, the government hereby objects to the factual findings and legal conclusions contained in the magistrate judge's November 18, 2025, memorandum and order (Dkt. No. 191, 192) as providing a basis to support the release of all grand jury materials to the defendant. The magistrate's order should be modified and set aside, and the government should not be required to provide the defendant with the grand jury materials that are sought.

The magistrate determined, pursuant to the Court's supervisory powers over the grand jury, that the use in a grand jury presentation—or even in preparing for a presentation—of evidence allegedly obtained in violation of a third party's Fourth Amendment rights or a defendant's claimed attorney-client privilege are bases for ordering the disclosure of grand jury material. This determination was made despite the magistrate acknowledging that the presentation of such evidence later deemed subject to suppression or obtained in violation of the attorney-client privilege is insufficient to dismiss an indictment. That was contrary to law.

The magistrate judge also found that two alleged misstatements of the law by the U.S. Attorney to the grand jury provided another basis for ordering disclosure of the grand jury material. That, too, was contrary to law, since those alleged misstatements—even if they were incorrect statements of the law—are no basis to dismiss the indictment.

I. BACKGROUND

On October 13, 2025, shortly after the defendant's initial appearance, the government sought the Court's assistance in implementing a filter protocol to prevent disclosure to the investigative team of potentially privileged or privileged material. Dkt. No. 38.[1] At that time, the government had already engaged with the defendant on the filter protocol, but the defendant objected to a filter protocol, preferring to challenge the underlying search warrants. *Id.* at 1, 4. The defendant opposed the government's motion. Dkt. No. 71. He asked the Court to "direct the government to disclose" five categories of information related to the protocol, none relating to grand jury material. *Id.* at 12. He noted that his "concerns with the government's respect for—and ability to safeguard—the defendant's attorney-client privileged materials are not merely hypothetical" because, he claimed, lead case agents "may have been exposed to attorney-client privileged materials." *Id.* at 6.

On October 29, 2025, the Court noted that "briefing on the government's proposed filter protocol raises several legal questions that must be resolved before any protocol is authorized." Dkt. No. 102 at 2. Citing the government's motion and the defendant's response, Dkt. Nos. 38 & 71, the Court appointed the magistrate judge "to preside over all proceedings related to the potential review of privileged materials in this case." Dkt. No. 102 at 1–2.

On October 30, 2025, the defendant filed a separate motion and memorandum seeking disclosure of grand jury material. Dkt. No. 106. In it, he "request[ed] that the Court direct the government to disclose the transcripts and audio recordings of all proceedings before the grand jury in this case" under Federal Rule of Criminal Procedure 6(e)(3)(E)(ii). *Id.* at 1. He argued, in part, that disclosure is required because "the agent who served as a witness in the proceedings may have been exposed to Mr. Comey's privileged communications with his attorneys and thus may have conveyed that information to the grand jury." *Id.*

On November 13, 2025, the government responded in opposition to the defendant's Motion to Disclose Grand Jury Proceedings. Dkt. No. 184. The defendant's reply is due on November 20. *Id.* The hearing has been set for December 9. *Id.*

During a November 5 hearing on the filter protocol before the magistrate judge, the government explained that an agent recently reviewing digital data from one of the 2019 and 2020 D.C. warrants observed a conversation that might have "involved attorney-client confidences." 11/5/25 Tr. at 12:23–13:6. The agent "immediately stopped" his review and alerted supervisors, and no further review has occurred. *Id.*

The defense stated that it was unknown whether the information seized under the 2019 and 2020 warrants had undergone a responsiveness review. *Id.* at 19:9–14. And defense counsel argued that, if the government had accessed "both the nonresponsive and responsive set," it "clearly" would have violated the Fourth Amendment. *Id.* at 20:11–19. The magistrate judge asked defense counsel, "What information do you need that you don't have in order to file a motion to properly challenge the original search, the continued use?" *Id.* at 23:14–16. Counsel responded that, among other things, they needed to know, "What does the government have now? What did they access and provide to the grand jury? . . . Where did they get those materials?" *Id.* at 24:17–20. The magistrate replied:

> The questions that [counsel] asks are going to be answered. She's entitled to know with great specificity how these warrants were executed, how the information was separated, how the information was used, up to and including how the information was using in the grand jury proceedings. As part of this, I am going to order the government to disclose to the defense all grand jury materials, not just the testimony of the agent, but anything that was said during the course of the grand jury. How the grand jury was instructed, any presentation to the grand jury, any questions that were asked of either the agent or the United States Attorney, all of that is to be disclosed because I think the defense needs that in order to marry up the information that they have or the information that they will get to how it was used. I don't know what motions are going to be filed. Maybe no motions are going to be filed, but they're entitled to this information quickly.

Id. at 26:4–21. The magistrate judge ordered the government to produce that information by 5:00 pm the next day. *Id.* at 26:21–22.

The government appealed the disclosure order. Dkt. No. 164. The Court remanded the matter to the magistrate judge "for further proceedings to analyze whether there are particularized and factually based grounds for disclosure." Dkt. No. 167 at 2.

On November 10, 2025, the magistrate judge held a telephonic hearing on the issue. Dkt. No.176. The magistrate judge requested the government produce, *in camera*, all the grand jury materials, and informed the defendant he could submit any *ex parte* information regarding the grand jury materials by the following day. *Id.* [2]

On November 17, 2025, the magistrate judge issued a Memorandum Opinion and ordered "that, by 3:00 p.m. on November 17, 2025, the Clerk of Court shall make available to the defense all grand jury materials filed on the docket under seal by the government (ECF 179); and . . . that the government shall, no later than 5:00 p.m. on November 17, 2025, produce to the defense the complete audio recording of the grand jury proceedings." Dkt. No. 192, 193.

On November 17, 2025, the government filed an emergency motion to stay the magistrate order. Dkt. No. 195. The defendant opposed. Dkt. No. 196. The Court granted the government's motion in part, stayed the order, and allowed the parties to file objections. Dkt. No. 197.

II. ARGUMENT

As a threshold matter, what began as the government's request for a filter protocol has morphed into a dispute regarding the defense's right to access grand jury materials, and has resulted in effectively a preliminary determination from the magistrate concerning the defense's ability to seek the suppression of evidence, disqualification, or dismissal because of alleged prosecutorial misconduct.[3] But the narrow issue presented was and is whether the defendant has met his burden of showing that particularized and factually based grounds exist to support the proposition that irregularities *in the grand jury proceedings* may create a basis for dismissal of the indictment. *See, e.g.*, Dkt. 184 at 5–6 (collecting cases); *see also, e.g.*, *United States v. Naegele*, 474 F. Supp. 2d 9, 10 (D.D.C. 2007). The defendant has not met his burden.[4] Therefore, the government objects to the magistrate judge's factual findings and legal conclusions contained in the order and accompanying opinion. *See* Dkt. Nos. 191 and 192.

In his order, the magistrate judge made what appear to be a series of effectively preliminary legal rulings and factual findings, pursuant to "its supervisory authority to dismiss the indictment," *see* Dkt. No. 191, at 19, as its basis for ordering disclosure of the grand jury material despite having received neither substantial briefing nor having been presented evidence concerning the following issues. *See id.* at 20–22. The Government respectfully submits that doing so was erroneous.[5]

Preliminary Fourth Amendment rulings.

- The magistrate judge appears to have determined that the government may have failed to comply with attachments accompanying four search warrants issued during the Arctic Haze investigation in 2019 and 2020, which authorized the government to search for and seize evidence of violations of 18 U.S.C. §§ 641 and 793.[6] *See id.* at 8–9, 20–21. The magistrate judge further determined—despite noting that "the validity of an indictment is not affected by the character of the evidence considered," *see id.* at 18 (cleaned up)—that those Fourth Amendment considerations warranted disclosure of the grand jury material. *See id.* at 21.
- The magistrate judge similarly appears to have determined that defendant has established a reasonable basis to file a suppression motion challenging the execution of the above-described search warrants, even though none of the search warrants were directed (as far as the government is aware) at property owned or controlled by the defendant. *See id.* at 20–21.

Preliminary finding regarding privilege concerns.

- The magistrate judge, despite acknowledging that the testifying agent was provided "a limited overview" regarding the privilege concerns, and the fact that based on its review of the grand jury transcripts no "overtly privileged communications" were presented to the grand jury, *see id.* at 14, nevertheless determined that the defense was entitled to production of the grand jury material on the theory that privileged information might have been used "by the government to prepare and present its grand jury presentation." *See id.* at 21.
- The magistrate judge further determined that the government took "ineffective" efforts to "identify and insolate potentially privileged information contained in the materials seized" pursuant to the search warrants, and that the government did not provide the defendant during the course of the Arctic Haze investigation "the opportunity to assert a privilege over his communications until after the indictment was obtained."[7] *See id.* at 7.
- ***Preliminary rulings regarding alleged prosecutorial legal error before the grand jury.***
- Finally, the magistrate judge appears to have determined that the U.S. Attorney may have provided incorrect legal instructions to the grand jury, and that the operative indictment returned by the grand jury may not have been "the same charging document presented to and deliberated upon by the grand jury." *See id.* at 15, 18. Those purported errors, the magistrate determined, further warranted disclosure of the grand jury materials. Those determinations by the magistrate judge were also mistaken.

A. Standard of review.

The Federal Rules of Criminal Procedure provide that a "district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense." Fed. R. Crim. P. 59(a). A magistrate judge "must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination." *See id.*

A party "may serve and file objections" to such an order "within 14 days after being served with a copy of a written order," and the "district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous." *See id.* "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure. It is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Williams*, 736 F. Supp. 3d 400, 403–04 (E.D. Va. 2024) (cleaned up).

B. A court may dismiss an indictment pursuant to its supervisory powers based on alleged misconduct before the grand jury only in extraordinary circumstances.

"As a general matter, judicial review of grand jury proceedings is extremely limited," and the "grand jury is traditionally considered an independent body that is unrestricted by the technical rules of evidence and procedure." *United States v. Invidior Inc.*, 2019 WL 6039969, at *3 (W.D. Va. Nov. 14, 2019). "Defendants alleging grand jury abuse bear the burden of rebutting the presumption of regularity attached to a grand jury's proceeding." *United States v. Alvarado*, 840 F.3d 184, 189 (4th Cir. 2016).

Nevertheless, "[t]he Supreme Court has . . . recognized that a district court may use its supervisory power to dismiss an indictment because of misconduct before the [grand] jury, at least where that misconduct amounts to a violation of one of those few, clear rules which were carefully drafted and approved by [the Supreme] Court and Congress to ensure the integrity of the grand jury's functions."[8] *United States v. Strouse*, 286 F.3d 767, 771–72 (5th Cir. 2002) (internal quotation marks omitted).[9] "The Supreme Court has also recognized that the supervisory power of Article III judges should be used to implement a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and finally, as a remedy to designed to deter illegal conduct."[10] *Id.* at 772 (internal quotation marks omitted).[11] It is plain, however, that the supervisory power is not to be used as a "means of prescribing . . . standards of prosecutorial conduct in the first instance."[12] *United States v. Williams*, 504 U.S. 36, 46–47 (1992).

C. The magistrate's order was contrary to law in assuming an alleged Fourth Amendment violation is a potential basis for dismissal of an indictment.

The magistrate judge determined that one of the principal bases warranting disclosure of the grand jury materials to the defendant was what the magistrate characterized as a variety of "potential violations of the Fourth Amendment" that, the Court found, might support a motion to suppress, and that its supervisory authority authorized it to order disclosure of the grand jury material as a result. *See* Dkt. No. 191 at 19, 21. But those alleged violations are no basis for ordering disclosure, because they were not "a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii).

Moreover, the magistrate's preliminary legal conclusion—which is not the subject of a motion to suppress—was contrary to law for two straightforward reasons. First, as the magistrate acknowledged, the review and use of evidence obtained allegedly in violation of the Fourth Amendment is not a basis for dismissal of an indictment. Second, the defendant cannot demonstrate a reasonable expectation of privacy in Richman's email accounts or property.[13] So any Fourth Amendment violation—even as to Richman, a nonparty—was no basis for ordering disclosure of grand jury material. That's so because if the use of evidence obtained in violation of the Fourth Amendment is no basis for dismissal of an indictment, the use of such evidence can't be a basis for ordering disclosure of grand jury materials to support a motion to dismiss an indictment pursuant to Rule 6(e)(3)(E)(ii).

i. The magistrate judge's order was contrary to law in concluding that the use and review of evidence allegedly obtained in violation of the Fourth Amendment violations is a basis for the disclosure of grand jury material.

The magistrate judge acknowledged that "the validity of an indictment is not affected by the character of the evidence considered." Dkt. No. 191 at 18 (cleaned up). Thus, a "grand jury may consider incompetent or unconstitutionally-obtained evidence, and judicial supervision may not be sought to challenge an indictment issued on the basis thereof." *In re Grand Jury Proceedings*, 142 F.3d 1416, 1425 (11th Cir. 1998). That's so because the Fourth Amendment's exclusionary rule does not apply to a grand jury investigation. *United States v. Calandra*, 414 U.S. 338, 349–52 (1974). The Fourth Amendment "does not prevent the use of illegally seized evidence in grand jury proceedings," *see Stone v. Powell*, 428 U.S. 465, 485 (1976), and, consequently, an indictment founded on evidence seized in violation of the accused's Fourth Amendment rights is "not thereby rendered defective." *United States v. Lawson*, 502 F. Supp. 158, 166 (D. Md. 1980).

Despite that clear governing law, the magistrate judge undertook to review preliminarily whether the Government's review or use of materials obtained in the Arctic Haze investigation in presenting the indictment to the grand jury had—in a general sense—violated the Fourth Amendment.[14] That is, despite, among other things, defendant's not having filed a motion to suppress, the district court sought to determine whether the Government had complied with the terms of the attachments to the search warrants obtained during the Arctic Haze investigation and whether evidence seized pursuant to those warrants was properly presented to the grand jury. *See generally* Dkt. No. 191 at 8–12, 19.

That analysis by the magistrate judge was contrary to law for the simple reason that, under governing law, a putative Fourth Amendment violation is not a basis for dismissal of an indictment pursuant to a federal court's limited supervisory powers. Indeed, were the law otherwise, the governing authority summarized above was clearly wrongly decided. That is so because, as the magistrate's analysis demonstrated here, "a complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was incomplete or misleading." *United States v. Williams*, 504 U.S. 36, 54 (1992) (cleaned up). But the Supreme Court has emphasized that such a review is emphatically not part of federal courts' supervisory authority; indeed, "[r]eview of facially valid indictments on such grounds would run counter to the whole history of the grand jury institution, and neither justice nor the concept of a fair trial requires it." *See id.* at 54–55 (cleaned up).

ii. The magistrate judge's order was contrary to law in assuming that defendant may vicariously assert Richman's Fourth Amendment rights.

The magistrate judge's generalized Fourth Amendment analysis was contrary to law for the second and independently sufficient reason that the defendant cannot properly seek suppression in this prosecution of evidence obtained from locations or property in which he has no reasonable expectation of privacy. The magistrate judge does not appear to have considered this controlling legal principle. *See* Dkt. No. 191 at 20–21.

"Fourth Amendment rights are personal rights and may not be vicariously asserted. A defendant seeking to suppress evidence based on an alleged Fourth Amendment violation must therefore demonstrate that he had a reasonable expectation of privacy in the location or items searched." *United States v. White*, 2018 WL 4103490, at *8 (S.D.N.Y. Aug. 28, 2018). Thus, "a defendant can only challenge a warrant that authorizes the search or seizure of items in which he had a protected Fourth Amendment interest. It is insufficient for the defendant to show that a third party had a protected interest in the information searched because it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections." *United States v. Zelaya-Veliz*, 94 F.4th 321, 333 (4th Cir. 2024); *see also, e.g.*, *White*, 2018 WL 4103490, at *8. "Thus, to prevail in a motion to suppress evidence obtained from a search, the defendant has the burden of showing that the government implicated a protected interest of his in conducting the search." *Zelaya-Veliz*, 94 F.4th at 333.

Consequently, numerous federal courts have determined that a third party—like the defendant—cannot vicariously challenge the propriety of the Government's execution of a search warrant on an email (or other online) account belonging to another. *E.g.*, *United States v. Johnson*, 2019 WL 917175, at *6–7 (D. Mass. Feb. 25, 2019); *United States v. Bazar*, 2015 WL 6396011, at *1 (S.D. Ca. Oct. 21, 2025). "This is so even if those devices" or email accounts "contained communications sent by [the defendant] to the third parties who owned or possessed them."[15] *United States v. Barros*, 2022 WL 1239924, at *3 (D. Mass. Apr. 27, 2022). The "government's intent to offer the challenged evidence" does not change that analysis. *See id.*; *see also, e.g.*, *United States v. McGuire*, 2017 WL 185573, at *4 (D. Nev. Feb. 2, 2017) (report and recommendation) (noting that "Fourth Amendment standing" must be "demonstrate[d]" on "an individual basis"), *denied as moot*, 2018 WL 709961 (D. Nev. Feb. 2, 2018).

Here, the magistrate judge appears to have preliminarily determined that the Government's review and use of materials obtained during the Arctic Haze investigation while preparing and during for the grand jury presentation raised Fourth Amendment concerns—despite the Court's not having received a motion to suppress or having conducted a hearing—and, consequently, that those Fourth Amendment considerations provided a basis for ordering disclosure of the grand jury material. *See* CM/ECF No. 191 at 20–21. The magistrate, however, does not to appear to have considered that any such argument might properly be raised by *Richman*, not to the defendant. Given the governing law summarized above—and the fact that, as the magistrate judge correctly noted, "the validity of an indictment is not affected by the character of the evidence presented," *United States v. Calandra*, 414 U.S. 338, 334–35 (1974)—it was contrary to law for the magistrate judge to apparently rely on a theory tacitly providing the defendant third-party standing vis-à-vis the material seized from Richman in order to order disclosure of the grand jury material.

D. The magistrate judge's order clearly erred in assuming without explanation that there has been a privilege violation and was contrary to law in ordering disclosure of the grand jury material as a result.

The magistrate judge in ordering disclosure pursuant to its supervisory authority acknowledged that it did not appear that "any overtly privileged communications" were presented to the grand jury, *see* Dkt. No. 191 at 14, and, further, that "the grand jury's consideration of evidence obtained in violation of the attorney-client privilege, on its own, does not constitute grounds for dismissal of an indictment." *See id.* at 18. The magistrate nevertheless determined that alleged deficiencies in the government's filter protocol during the Arctic Haze investigation and during the present prosecution warranted its ordering disclosure of the grand jury material pursuant to its supervisory authority. *See id.* at 21–22. That, too, was error, because any errors concerning the filter protocol were not "a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii).

Regardless, the magistrate's privilege analysis was incorrect for two independently sufficient reasons. First, the magistrate judge's conclusion that disclosure was warranted pursuant to its supervisory authority was contrary to law. That's so because, as the magistrate acknowledged, review and use of evidence obtained allegedly in violation of attorney-client privilege is not a basis for dismissal of an indictment. If the review and use of such evidence isn't a basis for dismissal, it should not be determined to be a basis for disclosure to support a motion seeking dismissal pursuant to Rule 6(e)(3)(E)(ii).[16] Second, the magistrate judge clearly erred as a factual matter in determining preliminarily that a sufficient basis existed to determine that there may have been a privilege violation—and that disclosure of the grand jury material was warranted—since the nature of the defendant's relationship with Richman is still not in evidence.[17] Indeed, that is why the government sought judicial approval of a filter protocol in this prosecution.

i. The magistrate judge's order requiring disclosure was contrary to law because the use of privileged material is not a basis for dismissing an indictment.

The magistrate judge acknowledged that attorney-client privileged material did not appear to have been presented to the grand jury, *see* CM/ECF No. 191 at 14, and that "the grand jury's consideration of evidence obtained in violation of the attorney-client privilege, on its own, does not constitute grounds for dismissal of an indictment." CM/ECF No. 191 at 18. Nevertheless, the magistrate found that disclosure of the grand jury materials was warranted pursuant to its supervisory authority principally because of the "unacceptable prospect that privileged materials were used to shape the government's presentation and therefore improperly inform the grand juror's deliberations." *See id.* at 14–15. But that decision was contrary to law for a simple reason: If the Government's *direct* use of evidence obtained in violation of the attorney-client privilege as part of its the grand jury presentation is, as the magistrate noted, no basis for dismissal of the indictment, its *indirect* use would, *a fortiori*, provide even less of a basis.[18] And since disclosure of grand jury material would not be warranted on the first basis, it plainly is not on the second.

The magistrate judge's order was similarly contrary to law in determining that alleged deficiencies in the Government's filter protocol during the Arctic Haze investigation and during the present prosecution, *see* Dkt. No. 191 at 7–8, 21–22, warranted its ordering disclosure of the grand jury material pursuant to its supervisory authority.[19] Again, that's so because if the *direct use* of attorney-client privileged information in a presentation—which the magistrate acknowledged did not appear to have occurred, *see* Dkt. No. 191 at 14—is no basis for dismissal, purported deficiencies in the antecedent investigation shouldn't be deemed to be, either.

ii. The magistrate judge's order requiring disclosure clearly erred in determining without additional factfinding that there may have been a privilege violation warranting disclosure.

The magistrate judge also clearly erred as a factual matter in determining without a sufficient basis that there may have been a privilege violation—and that disclosure of the grand jury material was accordingly warranted—since the nature of the defendant's attorney-client relationship with Richman remains, as least as to the Government, unclear.[20]

Although the defendant apparently retained Richman as his counsel "the day after his removal" as FBI Director or "very shortly thereafter," *see* CM/ECF No. 191 at 7, the government is as yet unaware of the scope of Richman's representation of the defendant.[21] Indeed, the defendant informed DOJ's Office of Inspector General that "he didn't consider" his directing Richman to provide information to the media to be privileged, and that he "didn't "intend to assert any kind of privilege about the direction to Richman." *See* Dkt. No. 138-11 at 50 (August 2019 OIG report). But Richman's concededly non-privileged provision of information to the media—and the defendant's authorization and approval of the same—is squarely at issue in this prosecution. *See* Dkt. No. 138 at 4–10.

As the Court of Appeals for the Fourth Circuit has explained, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," and, when applicable, "it affords confidential communications between lawyer and client complete protection from disclosure." *In re Grand Jury Subpoena*, 204 F.3d 516, 519 (4th Cir. 2000) (cleaned up). However, since the privilege "impedes the full and free discovery of the truth," it is "to be narrowly construed," and is "recognized only to the very limited extent that excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *See id.* (cleaned up). As a result, "the burden is on the proponent of the attorney-client privilege to demonstrate its applicability." *See id.* (cleaned up).

Here, the magistrate clearly erred—given that the defendant has not, so far as the government is aware, demonstrated the scope of the defendant's attorney-client relationship with Richman and its applicability to their particular communications—in determining without additional factfinding that the Government's awareness regarding a potential privilege violation warranted disclosure of the grand jury materials.[22]

E. The U.S. Attorney's statements to the grand jury were not improper and provide no basis for disclosure.

The magistrate judge's conclusion that two isolated statements by the U.S. Attorney justify disclosure of grand-jury materials is legally untenable and factually indefensible. The recommendation cannot survive scrutiny because it is built on incomplete quotations, selective omissions, and a reading of the transcript that departs materially from what the record actually shows.

Federal courts have an affirmative obligation to ensure that judicial findings accurately reflect the evidence. Canon 2(A) of the Code of Conduct for United States Judges requires every judge to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and to avoid orders that "misstate or distort the record." Canon 3(A)(4) requires courts to ensure that factual determinations are based on the actual record, not assumptions or misrepresentations. Measured against these obligations and the rule of law, the magistrate's reading of the transcript cannot stand.

Even if the challenged statements were accepted as the magistrate judge described them – which they cannot be – they would still fall far short of the demanding standard required for disclosure under Rule 6(e). But the threshold flaw is more fundamental: the order rests on a distorted account of the transcript, and federal courts have an obligation to ensure that judicial findings accurately reflect the evidence in front of them.

The magistrate judge asserts that the U.S. Attorney implied Mr. Comey lacked a Fifth Amendment right not to testify. The complete transcript demonstrates the opposite. The U.S. Attorney issued a single, continuous explanation of how trial testimony differs from the grand jury's function, and the magistrate judge's attempt to split that explanation into two disconnected "statements" produces a meaning that simply is not present in the actual text.

The complete text, as one statement, reads:

[redacted]

See Dkt. No. 178-1 at 105 (emphasis added).

The portion the magistrate judge omitted is dispositive. The U.S. Attorney expressly refocused the grand jury on its limited role and told them not to concern themselves with trial testimony. The instruction is clear, direct, and completely incompatible with the magistrate judge's conclusion. Canon 2(A) obliges the courts to account for the full context before finding impropriety; here, the critical contextual language was not addressed.

At a minimum, the magistrate judge's failure to account for this critical passage renders the analysis unsound. No court can deem a prosecutor's remarks improper while disregarding the very language that corrects any arguably ambiguous phrasing. Courts cannot base a finding of "misstatement" on a partial sentence when the rest of the sentence eliminates the issue.

Federal courts uniformly hold that even genuine errors do not justify dismissal or disclosure unless they "seriously misstate the applicable law" or "cast grave doubt" on whether the grand jury's decision was influenced. *United States v. Stevens*, 771 F. Supp. 2d 556, 567 (D. Md. 2011). The magistrate judge could not have found such an effect because the transcript forecloses it. The reliance on *Griffin v. California*, 380 U.S. 609 (1965), is also misplaced. *Griffin* concerns impermissible comment on a defendant's silence at trial. It has no bearing on a general explanation of trial procedure to a grand jury, particularly where the prosecutor immediately told the grand jurors that the question of who might testify at a future trial had nothing to do with their task. The Supreme Court has consistently underscored the presumption of regularity owed to grand-jury proceedings. *United States v. Enterprises*, 498 U.S. 292, 301 (1991). The magistrate judge discarded that presumption without any factual basis.

Furthermore, the magistrate added that the statement by the prosecutor was made in "response to challenging questions from grand jurors," Dkt. No. 191 at 16, which, the magistrate found, additionally supported disclosure, presumably on the theory that the U.S. Attorney had wrongly instructed the grand jury. But the magistrate judge was mistaken. The transcript itself refutes the notion that the U.S. Attorney was responding to unresolved juror confusion about Fifth Amendment rights. The last question from a grand juror appears several pages earlier in the transcript, during an exchange between the U.S Attorney and the witness about [redacted] and in that exchange the juror's question was resolved. Dkt. No. 178-1 at 101–03. After questions and answers between the U.S Attorney and the witness and [redacted] the following exchange occurred:

[redacted]

See id. at 101–03. No additional juror questions followed. The U.S. Attorney's later remarks were not an attempt to resolve any confusion, because none existed. The contrary conclusion has no grounding in the transcript. *Id.* at 103–05.

Thus, the U.S. Attorney's statement considered in whole, did not serve as an instruction to the grand jury that it did not have to rely on the record before it in determining whether there was probable cause to return an indictment. Instead, the U.S. Attorney properly informed the jurors that a trial jury would determine guilt or innocence, not them, that it was understandable to have many questions, and that the government anticipated presenting additional evidence were the case to proceed to trial. When the U.S. Attorney's comments are read fairly, fully, and in context – as the Code of Conduct requires – the conclusion is unavoidable: there was no misstatement of law, no misleading of the grand jury, and no impropriety whatsoever. The magistrate judge's contrary finding rests on a misreading of the transcript and cannot support disclosure.

F. The grand jury transcript is complete and provides no basis for disclosure

Finally, the magistrate judge concluded that putative problems regarding the completeness of the grand jury transcript and the manner in which the second indictment was presented to the grand jury merited disclosure. Dkt. No. 191 at 16–17. The magistrate erred by dismissing the US. Attorney's declaration explaining what transpired during and after the grand jury presentation as well as the statements of the grand jury foreperson to the judge at the time of the indictment return. A court may not invoke Rule 6(e)(3)(E)(ii) based on speculation about what might be missing. Canon 2(A) prohibits findings that rest on conjecture rather than evidence. The magistrate judge's suggestion that concerns about the transcript's completeness justify disclosure is equally unfounded. The record is unambiguous, and the magistrate judge's interpretation is squarely contradicted by every source that actually participated in the proceedings.

The U.S. Attorney's declaration confirms the events that occurred following the grand-jury proceeding. The court reporter's contemporaneous email confirms it. The grand-jury foreperson's open-court statements confirm it. And the transcript itself confirms it. The confusion arises solely from the magistrate judge's misinterpretation of the administrative correction removing Count One from the indictment after the grand jury returned a true bill on Counts Two and Three. That adjustment simply reflected the grand jury's vote; it was neither unusual nor improper. Courts do not abandon the presumption of regularity based on misunderstandings contradicted by every factual source.

Contrary to erroneous news articles and the defendant's assumptions, there was only one indictment presented to the grand jury. *See* Dkt, No. 10 at 5–6; Dkt. No. 188-1 (Declaration of Lindsey Halligan). As explained in detail by the U.S. Attorney, she only presented the indictment once and the grand jurors only deliberated once for an extended period of time. Dkt. No. 188-1. That fact has been confirmed by the court reporter. *See* Gov. Ex. 1 (email from court reporter). The proposed indictment included three proposed counts, but the grand jury did not return a true bill on original Count One, as the foreperson explained during the return of the indictment. *See* Dkt, No. 3; Dkt, No. 10 at 3, 5–6.

As a result of the grand jury's determination that probable cause existed to believe that defendant had committed two of the charges set forth in the proposed indictment, the draft indictment was amended to remove the first count and keep the remaining two counts on which the grand jury had concurred.[23] Nevertheless, that is what transpired. Dkt No. 1. This was not, as the magistrate judge opines, an "unusual series of events" and is fully explained by the U.S. Attorney's declaration, the court reporter's recollection, the grand jury coordinator's discussion with the grand jury foreperson, and the grand jury foreperson's explanation in court. Consequently, the presumption of regularity associated with grand jury proceedings is not an issue, and the grand jury's vote on the two counts of the operative indictment should not be disturbed. Rule 6(e) (3)(E) (ii) does not authorize disclosure based on conjecture, and courts do not abandon the presumption of regularity based on misunderstandings that are flatly inconsistent with the record. The transcript is complete. The procedure was proper. And no aspect of the record supports the magistrate judge's assumptions.

III. CONCLUSION

The magistrate judge's recommendation is grounded in misreadings of the transcript, incorrect legal conclusions, and factual assumptions that the record directly disproves.

None of the rationales offered for disclosure withstands examination. The U.S. Attorney did not misstate the law, the grand jury was not misled, and the transcript shows a routine, regular presentation of the indictment.

Because the magistrate's findings are unsupported by the record and inconsistent with the governing legal standards, the Court should set aside the magistrate judge's order and deny the request for disclosure under Rule 6(e) (3) (E) (ii).

Respectfully submitted this 19th day of November, 2025.

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CERTIFICATE OF SERVICE

This is to certify that I have this 19th day of November, 2025, the government served a copy of the foregoing upon the defendant by CM/ECF to:

Jessica Nicole Carmichael
Counsel for Defendant

Patrick Joseph Fitzgerald
Counsel for Defendant

Rebekah Donaleski
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Respectfully submitted,

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GOVERNMENT EXHIBIT 1

From: [redacted]
To: Lemons, Tyler (USANCE); Diaz, Gabriel (USANCE); Halligan, Lindsey (USAVAE)
Subject: Fw: Follow up
Date: Monday, November 17, 2025 11:51:08 AM

Please see below if you need any more of a detailed explanation.

From: [redacted]DiversifiedReporting[redacted]
Sent: Monday, November 17, 2025 11:43:30 AM
To: [redacted]
Subject: [EXTERNAL] Follow up

Good morning [redacted]
With the high profile nature of these cases, we went back through the audio and transcript for the J.C. case again and can confirm that no audio was missed and no testimony was left out. There was one instance where the prosecutor had technical issues with ELMO and some of the jurors assisted and [redacted] came in to assist as well. That is detailed out in the transcript. When the prosecutor was finished presenting her case, she and the court reporter left the room, as is standard procedure, to let the jury deliberate. It was about 2 hours of deliberations. Both the court reporter and the CSO remained in the Grand Jury area (outside the jury room but in the secure area where the breakroom and restrooms are) during the deliberation period. When the deliberations were finished and the jurors were released, the court reporter went back into the jury room, transferred the audio files and annotations to the envelope and brought the envelope to our offices. The length of the audio files match to the timestamps in the annotations and nothing was missed or otherwise left out of the transcript.

Let me know if there's anything else I can help out with.

Thank you,

[redacted]
Director of Business Operations
Diversified Reporting Services, Inc.
[redacted]

This e-mail message and all attachments transmitted with it may contain legally privileged and/or confidential information intended solely for the use of the addressee(s). If the reader of this message is not the intended recipient, you are hereby notified that any reading, dissemination, distribution, copying, forwarding or other use of this message or its attachments is strictly prohibited. If you have received this message in error, please notify the sender immediately and delete this message and all copies and backups thereof. Thank you.

Footnotes

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[1] On October 19, 2025, the government moved to expedite ruling on its motion for implementation of a filter protocol. Dkt. No. 54. This motion also alerted the Court that the "evidence for filter review could also inform a potential conflict and disqualification issue for the current lead defense counsel, Patrick Fitzgerald." *Id.* The next day, the defendant filed his opposition to an expedited ruling, requesting the full 14 days to file a response. Dkt. No. 55.

[2] Although the docket indicates the government provided the materials for *in camera* review, Dkt. No. 179, the docket does not reflect that defendant submitted *ex parte* information to the Magistrate Judge. However, the magistrate judge referenced the defendant's *ex parte* notice in its opinion. *See* Dkt. 191 at 7.

[3] Rule 6(e) constrains the government's ability to describe what information or evidence the grand jury considered (or did not consider). Nothing in this response should be taken as a concession that particular evidence was presented to the grand jury.

[4] Consequently, disclosure of the grand jury material on the theory that the defendant might use that material to file *additional motions* to dismiss is inappropriate; Rule 6(e) does not permit a defendant to inspect grand jury material in the hope that the material will support a motion to suppress, disqualify, or dismiss based on conduct unrelated to the grand jury proceedings. *See* Dkt. 184 at 7.

[5] In particular, the Government objects in the strongest terms to the magistrate's suggestion that any error on the part of the Government might have been in reckless or willful disregard of the law. *See* CM/ECF No. 191 at 21–22. Indeed, it is difficult to square that suggestion with, among other things, the magistrate's acknowledging that even the use of illegally-obtained evidence or attorney-client information in the grand jury is no basis to dismiss an indictment, *see id.* at 18, that attorney-client information does not appear to have been presented to the grand jury, *see id.* at 14, the fact that the non-privileged evidence reviewed by the government and presented to the grand jury was obtained pursuant to judicially-authorized search warrants, *see id.* at 6, the fact that defendant stated to the Department of Justice's Office of Inspector General that he did not consider Richman's disclosures to the media to be part of their attorney-client relationship, *see* Dkt. 138-11 at 50, and the fact that the government employed a filter protocol in the Artic Haze investigation and sought judicial relief in this prosecution via a filter protocol.

[6] The magistrate judge did not explain how lawfully-seized evidence regarding those crimes might not also serve as evidence of other crimes in a subsequent prosecution of a third party who cannot vicariously assert the Fourth Amendment rights of the person whose property was searched and seized. *See id.* at 9 n.3.

[7] The problems raised by the magistrate judge's findings on this issue are compounded by the fact that the scope of Richman's representation of the defendant remains unclear. That consideration is especially demonstrated by defendant's statements to the DOJ's Office of Inspector General that "he didn't consider" his directing Richman to provide information to the media to be privileged, and that he "didn't "intend to assert any kind of privilege about the direction to Richman." *See* Dkt. No. 138-11 at 50 (August 2019 OIG report).

Nevertheless, the magistrate judge in his opinion did not explore (or seek to explore) the scope of Richman's attorney-client relationship with the defendant. *See* Dkt. No. 191 at 7; *cf.* Va. R. Prof. Conduct 1.2 cmt. 6 (noting that "[t]he objective of scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client," and that the "terms upon which representation is undertaken may exclude specific objectives or means").

[8] The Court in *Williams* explained that "Rule 6 of the Federal Rules of Criminal Procedure contains a number of such rules," and that "[a]dditional standards of behavior for prosecutors (and others are set forth in the United States Code." *See* 504 U.S. at 46 n.6. The magistrate judge notably did *not* find that such an alleged violation occurred in ordering production of the grand jury material.

[9] In reviewing a motion to dismiss for alleged grand-jury error, a court is not to evaluate the quality of the evidence presented; "the validity of an indictment is not affected by the character of the evidence considered." *United States v. Calandra*, 414 U.S. 338, 344–45 (1974). "Review of facially valid indictments on such grounds would run counter to the whole history of the grand jury institution, and neither justice nor the concept of a fair trial requires it." *United States v. Williams*, 504 U.S. 36, 54–55 (1992) (cleaned up). Thus, "the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment," and "a challenge to the reliability or competence of the evidence presented to the grand jury will not be heard." *Williams*, 504 U.S. at 54 (internal quotation marks omitted). That is so because a "complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was incomplete or misleading." *See id.* (internal quotation marks omitted).

[10] Should a defendant demonstrate that error—whether constitutional or non-constitutional— occurred before the grand jury, "the age-old rule of harmless error applies." *United States v. Akinyoyenu*, 199 F. Supp. 3d 34, 36 (D.D.C. 2016); *see also, e.g.*, *United States v. Agu*, 2000 WL 1910161, at *1 (5th Cir. 2000) (per curiam); *United States v. Benjamin*, 2019 WL 4920875, at *6 (D.V.I. Oct. 5, 2019) (collecting cases). "[D]ismissal of an indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (internal quotation marks omitted).

The harmless error rule does not apply, and a defendant is not required to demonstrate prejudice, however, in a small class of constitutional cases "in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 257 (1988). Structural error occurs "only in a very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468 (1997). The *Bank of Nova Scotia* Court explained that "racial discrimination in selection of grand jurors" or the exclusion of women from a grand jury constituted such structural error. *See Bank of Nova Scotia*, 487 U.S. at 257.

[12] The Court's statement in *Williams* aptly describes the fundamental problem with the magistrate judge's order. Rather than determining whether disclosure was warranted because of a "matter that occurred before the grand jury" that might support a motion to dismiss the indictment, *see* Fed. R. Crim. P. 6(e)(3)(E)(ii), the magistrate relied on its supervisory authority in principally determining that Fourth Amendment and privilege considerations warranted disclosure, despite acknowledging that those considerations were not substantive grounds to dismiss the indictment. But "prescribing . . . standards of prosecutorial conduct in the first instance" like those relied upon by the magistrate judge in ordering disclosure is emphatically what *Williams* proscribes. *See* 504 U.S. at 46–47.

[13] The Government agrees, however, that any information obtained from Richman's property that contains attorney-client privileged, attorney-client confidential, or attorney work-product information of the defendant should not be made available to the investigative team. Indeed, that is the reason that the Arctic Haze investigation employed a filter protocol and the reason the government again requested one from the Court in October.

[14] Consistent with that review, the district court noted that the Court of Appeals for the Fourth Circuit "has held that the government's prolonged retention and continued access to materials that are non-responsive to a search warrant may violate the Fourth Amendment." *See* CM/ECF No. 191 at 11 n.6. While the Government concededly did not seek a new search warrant in 2025 before seeking the indictment, *see id.* at 11, the evidence relied upon by the government in seeking the indictment was plainly responsive to the each of the Attachments B appended to the Arctic Haze warrants.

[15] "The law is clear that the burden on the defendant to establish Fourth Amendment standing is met only by sworn evidence, in the form of affidavit or testimony, from the defendant or someone with personal knowledge." *United States v. Bondars*, 2018 WL 9755072, at *1 (E.D. Va. Apr. 23, 2018) (cleaned up).

[16] Similarly, the magistrate's conclusion that purported deficiencies in the Government's filter protocol—a matter which has not yet been litigated here—meant that "privileged material [might have been] used, directly or indirectly, by the government to prepare to prepare and present its grand jury presentation," *see* CM/ECF No. 191 at 21, warranted disclosure of the grand jury material pursuant to its supervisory authority was contrary to law. That's so for substantially the same reason—if the review and use of such evidence isn't a basis for dismissal, it should not properly be deemed a basis for disclosure.

[17] The Government of course has not had the opportunity to review any *ex parte* submission provided by the defendant regarding this issue. *See* CM/ECF Nos. 176, 191 at 7.

[18] Despite the guidance provided by the FBI's Office of General Counsel to the investigators, *see* Dkt. No. 191 at 13, the Government does not concede that the present investigative team, including the agent who testified before the grand jury, are subject to disqualification or any other remedy as a result.

[19] The magistrate judge in reaching that conclusion suggested that the Government erred by making "a conscious decision to exclude [defendant] from the filter process," even though defendant was and is the holder of any privilege as between himself and Richman. *See* Dkt. No. 191 at 8. The Government, however, is unaware of authority that would require it to engage with a potential target or subject of a criminal investigation in that fashion, particularly when the Artic Haze warrants were filed under seal.

[20] Indeed, the Court of Appeals for the Fourth Circuit has provided a considerably more nuanced standard in adjudicating whether dismissal of an indictment or disqualification is appropriate because of an alleged violation of the attorney-client privilege than that apparently utilized by the magistrate in ordering disclosure. *See United States v. Brugman*, 655 F.2d 540, 545–46 (4th Cir. 1981).

The Court of Appeals has "identified four factors that a court must consider when evaluating whether the government has violated the Sixth Amendment by invading the attorney-client relationship: (1) whether the government's intrusion was intentional in order to garner confidential, privileged information; (2) whether the government directly or indirectly obtained evidence through the intrusion that it later used at trial; (3) whether the information gleaned by the government from the intrusion was otherwise used to the substantial detriment of the defendant; and (4) whether the defendant learned the details of the defendant's trial preparation." *United States v. Elbaz*, 396 F. Supp. 3d 583, 592 (D. Md. 2019) (cleaned up; citing *Brugman*, 655 F.2d at 546). Moreover, in "the Fourth Circuit, the defendant must put forward some showing of prejudice to succeed on a claim for a Sixth Amendment violation based on an invasion of the attorney-client relationship." *Elbaz*, 396 F. Supp. 3d at 592 (cleaned up).

Here, however, the magistrate did not in ordering disclosure—despite any filtering errors not being a "matter before the grand jury," *see* Fed. R. Crim. P. 6(e)(3)(E)(ii)—consider any of the above-described factors, other than by determining that privileged materials may have been "used to shape the presentation and therefore improperly inform the grand jury's deliberations." Dkt. 191 at 15. Nevertheless, as described above, that was no basis for ordering *disclosure*, since, as the magistrate acknowledged, even the grand jury's overt consideration of privileged material would have been no basis for *dismissal*. *See* Dkt. 191 at 18.

[21] Consequently, the Government sought judicial assistance regarding this issue in October 2025.

[22] That is so whether or not that determination is characterized as an error of fact or one of law, since, as described above, the magistrate noted that even the Government's use of attorney-client privilege information as part of its grand jury presentation would not warrant dismissal. *See* Dkt. No. 191 at 18. Given that legal principle, it is difficult to apprehend how the Government's mere awareness that a filter protocol was needed pursuant to Rule 6(e)(3)(E)(ii) merit disclosure of the grand jury material that is sought.

[23] After the Nov. 19, 2025, hearing on the defendant's vindictive prosecution memorandum, the EDVA Grand Jury coordinator informed the undersigned that the grand jury foreperson informed her they had returned a true bill as to counts two and three, and not as to count one. The coordinator was informed by the Deputy Criminal Chief to amend the indictment by removing the text of former count one, and moving the remaining counts, two and three, to reflect as counts one and two. The grand jury coordinator then returned to the grand jury room and presented the corrected indictment to the grand jury foreperson and the deputy foreperson.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America,)
v.) Case No.: 1:25-CR-00272-MSN
James B. Comey, Jr.,)
Defendant.)

JAMES B. COMEY, JR.'S REPLY IN SUPPORT OF MOTION FOR A BILL OF PARTICULARS

INTRODUCTION

This case is less than seven weeks from trial, and Mr. Comey still has little indication of what the actual factual bases are for the charges against him amidst the government's shifting theories and voluminous discovery. Far from fairly advising Mr. Comey of the charges against him and enabling him to prepare for trial, the government has taken every opportunity to obfuscate its case against Mr. Comey, in its sparsely worded putative indictment, its conflicting narratives in its opposition motions, and in its provision of mountains of seemingly irrelevant discovery. The Court should not permit a trial by ambush and should order the government to provide a bill of particulars.

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ARGUMENT

A motion for a bill of particulars is not a motion to dismiss an indictment. Both devices address the concern that a "cryptic form of indictment . . . requires the defendant to go to trial with the chief issue undefined," "gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture," and makes it impossible "for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task." *See Russell v. United States*, 369 U.S. 749, 766, 769 (1962) (citations omitted). Contrary to the government's argument (at 8-9), however, the test in ruling on a motion for a bill of particulars is not whether the indictment is "sufficient" to survive dismissal, but whether "deprivation of the information sought will render the defendant subject to unfair surprise." *United States v. Sampson*, 448 F. Supp. 2d 692, 696 (E.D. Va. 2006) (citing *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996)); *cf. United States v. Brandon*, 298 F.3d 307 (4th Cir. 2002) (addressing motion to dismiss indictment); *Hamling v. United States*, 418 U.S. 87 (1974) (same); *United States v. Wicks*, 187 F.3d 426 (4th Cir. 1999) (same); *United States v. Smith*, 44 F.3d 1259 (4th Cir. 1995) (same).

The trial court has broad discretion in deciding whether to require a bill of particulars as needed "'to fairly apprise the defendant of the charges against him so that he may adequately prepare a defense and avoid surprise at trial.'" *Sampson*, 448 F. Supp. 2d at 696 (quoting *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 405 (4th Cir. 1985)). For example, a bill of particulars can be necessary to cabin trial preparation for a defendant who has been provided with "mountains of documents" with little to no indication of their relevance, *United States v. Perry*, 30 F. Supp. 3d 514, 523-24 (E.D. Va. 2014), or to allow a defendant to request materials under, and the court to monitor the government's compliance with, *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, *see United States v. Trie*, 21 F. Supp. 2d 7, 25 (D.D.C. 1998).

I. A Bill of Particulars Is Warranted as to Count One of the Putative Indictment

Count One of the putative indictment charges Mr. Comey with making a false statement to Congress, in alleged violation of 18 U.S.C. § 1001(a)(2). *See* ECF No. 1 at 1. The government argues in its opposition that Count One is "straightforward" and that Mr. Comey's requests for additional detail regarding Count One amounts to a request for "detailed disclosure of the government's evidence in advance of trial." Opp. at 13 (quoting *Automated Med. Labs, Inc.*, 770 F.2d at 405). Not so. Mr. Comey seeks the information required to mount a defense to a charge that not only misstates Mr. Comey's testimony, but also appears wholly unsupported by the discovery produced by the government.

A. The Government's Failure to Identify a Coherent Factual Basis for Count One Prevents Mr. Comey From Preparing for Trial

According to the government, "Count One of the indictment charges the defendant with falsely stating on or about September 30, 2020 to a U.S. Senator—*i.e.*, Senator Cruz—that he had not authorized Richman to the be an anonymous source in news reports regarding the Clinton email investigation." Opp. at 13.[1] The government contends that this charge is "straightforward" and "does not . . . require the Government to identify every occasion on which defendant authorized Richman to act as an anonymous source regarding the Clinton investigation." *Id.* But the government's failure to identify a *single* instance in which Mr. Comey authorized Mr. Richman (while Mr. Richman was "at the FBI") to act as an anonymous source makes this charge, at minimum, less than "straightforward" to defend against at trial.

The government provided almost none of this detail about Count One in the putative indictment. Count One alleges only that "[o]n or about September 30, 2020," Mr. Comey "willfully and knowingly" made "a materially false, fictitious, and fraudulent statement in a matter within the jurisdiction of the legislative branch of the Government of the United States" when he stated during a Senate Judiciary Committee Hearing that he "had not 'authorized someone else at the FBI to be an anonymous source in news reports' regarding an FBI investigation concerning PERSON 1," when in fact, Mr. Comey "then and there knew, he in fact had authorized PERSON 3 to serve as an anonymous source in news reports regarding an FBI investigation concerning PERSON 1." ECF No. 1 at 1. The government did not clarify until October 15, 2025 that "PERSON 1" referred to Hillary Clinton, and "PERSON 3" referred to Daniel Richman, Br. at 1, and it did not confirm until its Opposition that the question at issue was posed by Senator Cruz, Opp. at 13.

In its briefing thus far, the government cited numerous communications and articles as the basis for Count One—none of which reflect Mr. Comey authorizing Mr. Richman (while "at the FBI") to be an anonymous source regarding the Midyear Exam investigation. In its Opposition to Defendant's Motion to Dismiss Indictment Based on Vindictive and Selective Prosecution, the government identified four instances that allegedly formed the basis for Count One: (1) communications with Mr. Richman in the days following Mr. Comey's letter to Congress on October 28, 2016, *see* ECF No. 138 at 9-10; (2) an email exchange between Mr. Comey and Mr. Richman in April 2017, regarding an article in the *New York Times*, *see id.* at 7; (3) exchanges between Mr. Richman and individuals other than Mr. Comey in February 2017 and May 2017, *see id.* at 7-8; and (4) Mr. Comey's testimony regarding his decision to share a memo he had written with Mr. Richman and others following his firing from the FBI on May 9, 2017, *see id.* at 9-12.

The government's position (at 8-9) is that presenting "facts" alone is enough to put Mr. Comey on notice of the nature of the charges against him. And the government is correct that, in some circumstances, providing the defendant with the "central facts" underlying the charge can obviate the need for a bill of particulars. Opp. at 12 (citing *United States v. Sykes*, 2016 WL 8291220, at *37 (E.D.N.C. Aug. 22, 2016)). But this presupposes that the facts alleged actually form the basis for the charge. For example, in *United States v. Automated Medical Laboratories, Inc.*, on which the government relies, a bill of particulars was not warranted with respect to the government's charge that the defendant participated in a conspiracy to falsify logbooks and records because the government provided relevant information regarding the factual basis for the charge "wherever it *could* do so." 770 F.2d at 405 (emphasis in original). In advance of trial, the government identified for defense counsel examples of logbooks and records that it contended were false, "generally described the type of evidence regarding each log and indicated the page numbers that the government intended to highlight at trial," and provided the defendant with "a copy of the logbook or document pertaining to each substantive count." *Id.* The court found that the government's provision of these relevant details was enough to "satisfy the purpose of a bill of particulars, which is to fairly apprise the defendant of the charges against him so that he may adequately prepare a defense and avoid surprise at trial." *Id.*

Here, the government has repeatedly failed to provide a coherent factual basis for its theory that Mr. Comey authorized Mr. Richman to be an "anonymous source" in news reports regarding the Midyear Exam investigation while Mr. Richman was "at the FBI." Of the communications following Mr. Comey's October 28, 2016 letter that the government cites in both briefs, none reflect Mr. Comey authorizing Mr. Richman to be an anonymous source. For instance, the communications show Mr. Richman discussed materials that were already public, like Mr. Comey's letter to Congress. *See, e.g.*, Opp. at 3 ("Wittes and I are spending a lot of time *saying your letter means exactly, and only what it says*." (emphasis added)); *id.* at 3-4 (quoting the defendant as telling Mr. Richman that Richman's contributing to a New York Times Opinion piece "would [be] shouting into the wind," and "that they would 'figure it out'" without Richman's contributions). And even where the government alleges that Mr. Comey encouraged Mr. Richman to speak to the press in late October and early November 2016, there is no indication that Mr. Richman did so anonymously; to the contrary, one of the exhibits the government cites references Mr. Richman's televised interview with Anderson Cooper. Opp. at 4 (citing ECF No. 138-6, 138-7). The remaining communications cited by the government in its Opposition to Defendant's Motion to Dismiss Indictment Based on Vindictive and Selective Prosecution suffer from numerous defects, but most critically, all occurred *after* February 7, 2017, when Mr. Richman left the FBI. This alone makes the government's theory that Mr. Richman was "at the FBI" when these communications occurred incomprehensible.

As the government's own briefing demonstrates, Count One is far from "straightforward"; with less than two months before trial, the government cannot even explain how Mr. Comey allegedly authorized Mr. Richman to serve as an anonymous source in news reports regarding an investigation into Hillary Clinton while Mr. Richman was "at the FBI." If the government has any factual basis for Count One, Mr. Comey is entitled to know it so that he can be apprised of the nature of the accusation. *Russell*, 369 U.S. at 766 (explaining that one of the "basic principles of fundamental fairness" on which our criminal justice system is founded is "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him" (citation omitted)).

A bill of particulars is necessary to allow Mr. Comey to learn the substance of the charges asserted by the government before trial, to cabin trial preparation, and to appropriately tailor his requests for discovery and exculpatory material. *See Perry*, 30 F. Supp. 3d at 523 ("[I]n cases involving vaguely asserted charges of fraud, perjury, or alteration of records, a bill of particulars may be necessary in order to provide a defendant a full and fair opportunity to prepare a defense."). One of the articles referenced by the government is the April 2017 article that was the subject of the Arctic Haze investigation. Mr. Richman is quoted by name in that article, and the article also notes that the reporters spoke with thirty other sources. *See* ECF No. 38 at 7; *see also* Matt Apuzzo, Michael S. Schmidt, Adam Goldman & Eric Lichtblau, *Comey Tried to Shield the F.B.I. From Politics. Then He Shaped an Election*, N.Y. Times (Apr. 22, 2017), https://perma.cc/2BDJ-TAT2 ("'Jim sees his role as apolitical and independent,' said Daniel C. Richman, a longtime confidant and friend of Mr. Comey's. 'The F.B.I. director, even as he reports to the attorney general, often has to stand apart from his boss.'"). Mr. Comey has served *Brady* requests on the government that seek, for each article the government intends to rely upon for Count One's alleged authorization to be an anonymous source, information about alternative sources of information. *See* Exs. 1-3. The government has not provided this information for the April 2017 article, or any article. The defense has concerns that certain of those records have, in fact, been destroyed.[2] Without knowing which articles the government intends to rely upon at trial, the defense is unable to ascertain whether the government has met its *Brady* obligations.

B. The Government's Approach to the Discovery Process Has Obfuscated, not Illuminated, the Basis for Count One

The government has produced more than 300,000 pages of discovery, along with substantial quantities of classified discovery.[3] That mountain of documents—in a two-count false-statement case—has only served to obscure the allegations and requires a bill of particulars.

As the government acknowledges, "the production of discovery does not necessarily obviate the need for a bill of particulars." Opp. at 11 n.3 (quoting *United States v. Blair*, 2021 WL 424411, at *4 (D. Md. Feb. 5, 2021)). That is, "[a] defendant is not fairly apprised of necessary information merely because the government provided 'mountains of documents to defense counsel who were left unguided as to which documents would be proven falsified' at trial." *Perry*, 30 F. Supp. 3d at 524; *see also United States v. Anderson*, 441 F. Supp. 2d 15, 19 (D.D.C. 2006) ("The Court agrees with the defendant that it is not a sufficient response to a motion for a bill of particulars to point to the voluminous discovery already provided or to a governmental open file policy.").

Where, as here, discovery is voluminous, a bill of particulars can be warranted to enable the defendant to identify relevant materials in discovery and monitor the government's compliance with its obligations under *Brady* and its progeny. *See United States v. Bortnovsky*, 820 F.2d 572, 575 (2d Cir. 1987) (district court erred in denying motion for bill of particulars where the government produced "mountains of documents to defense counsel," including "numerous documents unrelated to the charges pending"); *Perry*, 30 F. Supp. at 524 (a bill of particulars was warranted where government's production contained "tens of thousands of documents"); *Trie*, 21 F. Supp. 2d at 26 (scope of *Brady* obligations could be evaluated after government's provision of bill of particulars).

The government says it has provided "broad discovery . . . which includes electronic data, investigative summaries, emails, previous hearing transcripts, and witness interviews" from multiple wide-ranging investigations. *See* Opp. at 15; Br. at 7. But that discovery reflects a scattershot approach that makes it exceedingly difficult, if not impossible, to dig through the blizzard of data to find the bases for the government's charge. Here, the government's production also includes numerous publicly available news articles, some of which quote Mr. Richman by name, Br. at 7, and some of which were published well after Mr. Richman confirmed that he was no longer serving as an SGE.

The government's only response to Mr. Comey's contention that this volume of irrelevant discovery hinders, rather than facilitates, his ability to prepare for trial, is that the "discovery produced . . . is more fulsome than required at this stage." Opp. at 8. Given the size of the pile, that is surely so, but it does nothing to help the defendant prepare for trial. Br. at 5.

II. A Bill of Particulars Is Warranted as to Count Two of the Putative Indictment

Count Two of the putative indictment charges Mr. Comey with "corruptly endeavor[ing] to influence, obstruct and impede" a Senate Judiciary Committee investigation on September 30, 2020 "by making false and misleading statements before that committee," in alleged violation of 18 U.S.C. § 1505. ECF No. 1 at 2. Although the government told the defense in a meet and confer on November 12, 2025 that the entirety of Count Two included the alleged false statement in Count One as well as a statement regarding a 2016 CIOL, the government now appears to suggest (at 14) that Count Two may be based on any other statement made by Mr. Comey at the September 30, 2020 hearing, "*[f]or instance*, the defendant's statements to Senators Grassley and Cruz regarding his use of Richman as an anonymous source concerning the Clinton email investigation and his statements to Senators Graham and Hawley regarding his alleged lack of memory concerning the so-called Clinton plan to 'Tie Trump' to Russia." Opp. at 14 (emphasis added). The government's position appears to be that pointing to a four-hour hearing in which Mr. Comey allegedly made the false statement, together with the discovery provided to date, is enough to allow Mr. Comey to prepare for trial. *See id.* The government is wrong.

Courts regularly require the government to provide a bill of particulars in fraud or false statements cases where the government fails to identify the allegedly false statements and state why they were false. *See, e.g.*, *Sampson*, 448 F. Supp. 2d at 696 (count of indictment that alleged that "Defendant committed mail fraud by delivering fraudulent documents relating to a 2004 Yukon Denali" failed to "state which specific documents were fraudulent and what was allegedly fraudulent about the documents at issue"); *Blair*, 2021 WL 424411, at *6 (requiring bill of particulars in medical insurance fraud case where allegations included "multiple crimes committed over a period of months" but government failed to identify which of the 491 prescriptions for which it produced discovery were at issue); *Anderson*, 441 F. Supp. 2d at 20 ("In striking the proper balance between the government's legitimate interests and the interest of the defendant in being able adequately to prepare his defense and not suffering unfair surprise at trial, the Court concludes that Anderson is entitled to know precisely which allegedly false statements the government relies on in each paragraph, the way in which the government alleges them to be false, and when approximately they were allegedly made.").

As described in Mr. Comey's Motion for a Bill of Particulars, the lengthy September 30, 2020 hearing at which the government alleges Mr. Comey made "false and misleading statements" spanned topics ranging from the FBI's Crossfire Hurricane investigation, to the investigation into Hillary Clinton's alleged mishandling of classified information, to white supremacist activities in the United States. Br. at 3. The government surely knows, seven weeks out from trial, which of Mr. Comey's statements at the September 30, 2020 hearing it believes were false, and could say so without burden.

Indeed, the government *must* know which statements it plans to rely on because it cannot broaden or alter the charges in the putative indictment; that is, it is not free to rummage through Mr. Comey's September 30, 2020 testimony and identify statements that it now contends are misleading but were never presented to or considered by the grand jury. *See United States v. Simmons*, 11 F.4th 239, 268-69 (4th Cir. 2021); *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999) (only the grand jury may broaden or alter the charges in the indictment). Mr. Comey "should not have to waste precious pre-trial preparation time guessing which statements he has to defend against . . . when the government knows precisely the statements on which it intends to rely and can easily provide the information." *Trie*, 21 F. Supp. 2d at 21; *see also Blair*, 2021 WL 424411, at *6 (noting that "the burden on the defense to wade through the massive amount of discovery, as compared to the relatively minor imposition on the government that would flow from the requested disclosure, need not be overlooked"). Allowing the government to wait until trial to identify the statements that form the basis of its prosecution, or even the topic of investigation Mr. Comey allegedly endeavored to obstruct would result in a failure "to fulfill [the] primary office" of an indictment—"to inform the defendant of the nature of the accusation against him." *Russell*, 369 U.S. at 767.

Nor would the government's approach allow Mr. Comey to adequately prepare a defense to Count Two. The topics covered at the September 30, 2020 hearing were subjected to extensive investigations during the first Trump administration, none of which resulted in charges against Mr. Comey and all of which likely generated exculpatory evidence to which Mr. Comey is entitled. Without knowing what Count Two is actually about, Mr. Comey cannot ensure he receives the exculpatory discovery to which he is entitled.

Finally, the government's position (at 7, 14) that Count Two may relate to Mr. Comey's testimony that he did not recall being "taught" [*sic*] of "an investigatory lead from the intelligence community" regarding "U.S. presidential candidate Hillary Clinton's approval of a plan concerning U.S. presidential candidate Donald Trump and Russian hackers hampering U.S. elections as a means of distracting the public from her use of a private email server" counsels in favor of requiring a bill of particulars. *See* Opp. at 7 (quoting ECF No. 138-14). This precise theory was presented to the grand jury, which found there was insufficient evidence to indict Mr. Comey for making a false statement. *See* ECF No. 3. And although the government purports to have probable cause to bring Count Two under this theory, it has since admitted that the grand jury did not even *see* the revised indictment. *See* ECF No. 195 at 48:16-23. A bill of particulars as to Count Two is critical because, as set forth in Mr. Comey's Reply Memorandum in Support of Motion for Disclosure of Grand Jury Proceedings, the government's reliance on this theory may be grounds for dismissal of Count Two.

III. Mr. Comey's Motion Does Not Seek "Inordinate Detail"

The government contends (at 14-15) that even if a bill of particulars were warranted, Mr. Comey's request "inappropriately seeks to compel the Government to provide inordinate detail regarding 'the precise manner in which the defendant[] committed the crimes charged.'" Opp. at 14 (quoting *United States v. McComber*, 2021 WL 5760731, at *6 (D. Md. Dec. 3, 2021)). Not so. Mr. Comey requested basic information regarding the government's factual basis for contending that the statement in Count One was false, as well as identification of the specific false statement or statements at issue in Count Two and the government's factual basis for alleging falsity with respect to each statement at issue. *See* Br. at 3-4. For the reasons set forth in Sections I and II, *supra*, this is appropriately addressed through a bill of particulars.

CONCLUSION

For the reasons set forth above, the government should be required to provide a bill of particulars as to Count One and Count Two of the putative indictment.

Dated: November 20, 2025

Respectfully submitted,

JAMES B. COMEY, JR.
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of November, 2025, a true copy of the foregoing document was filed electronically through the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jessica N. Carmichael
Jessica N. Carmichael

Counsel for Defendant James B. Comey, Jr.

Footnotes

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[1] As used herein, "Opp." refers to the United States' Response in Opposition to Defendant's Motion for Bill of Particulars, ECF No. 183, and "Br." refers to James B. Comey, Jr.'s Motion for a Bill of Particulars, ECF No. 107.

[2] As part of the Arctic Haze investigation, prosecutors subpoenaed call detail records for the authors of that article, including Mr. Apuzzo's, Mr. Schmidt's, Mr. Goldman's, and Mr. Lichtblau's conversations with more than 30 potential sources for the April 2017 article. *See* Charles Savage & Katie Benner, *Trump Administration Secretly Seized Phone Records of Times Reporters*, N.Y. Times (June 2, 2021), https://perma.cc/D3N4-X2R6. The government also secured a court order to seize logs—but not contents—of the reporters' emails, but "no records were obtained." *See id.* Needless to say, the fact that the reporters spoke with dozens of additional sources for that article other than Mr. Richman is exculpatory evidence in this case (and must have been recognized as exculpatory evidence in the Arctic Haze investigation, as well). The defense requested this information in a discovery demand. *See* Exs. 2-3. Based on an FBI 302 report produced in discovery, it appears that the Arctic Haze prosecutors and agents may have destroyed grand jury materials relating to members of the news media. The defense asked the government for an accounting of the relevant evidence that it destroyed, via letter on November 12, 2025, *see* Ex. 3. In an email on November 20, 2025 at 10:29 AM ET, the government represented that the 302 was inaccurate and the records had not, in fact, been destroyed. Mr. Comey reserves his rights with respect to the government's potential spoliation of exculpatory evidence and will further investigate the government's claim.

[3] Although the government has declassified evidence it views as inculpatory so it could be attached to court filings, *see* ECF No. 138, it has maintained potentially exculpatory evidence at the classified level. The defense expects to raise issues related to the government's selective declassification and general over-classification in future filings. *See* Ex. 4.

Exhibit 1

PATRICK J. FITZGERALD, ESQ.

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Lindsey Halligan, Esq.
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October 2, 2025

Re: *United States v. James Comey*; No. 1:25-CR-272

Dear Ms. Halligan:

I write in relation to the above-referenced matter to request that you promptly produce all materials contemplated under Rule 16 of the Federal Rules of Criminal Procedure and pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny, as set forth in greater detail below. As part of that production, we write to make specific requests to preserve and produce certain documents highly relevant to core issues we intend to raise in our challenge to the indictment.

Relevant Background Facts

James Comey has exercised his First Amendment rights to criticize President Trump over the last eight years. Meanwhile, President Trump's personal enmity for Mr. Comey has been open, notorious, and frequent. All of that is part of how a free and open democracy works. But this prosecution represents a dangerous departure from the laws and principles that define our democracy. The President intensely pressured the Department of Justice ("DOJ") to bring a vindictive (and meritless) prosecution against Mr. Comey in an effort to silence him and intimidate other critics.

In September 2025, there was a torrent of public reporting that the United States Attorney's Office for the Eastern District of Virginia ("the EDVA") was investigating Mr. Comey for allegedly providing false sworn testimony.[1] There was also substantial reporting that the Assistant United States Attorneys ("AUSAs") at EDVA had serious concerns about the merits of the prosecution and that then Interim United States Attorney Erik Siebert (a career prosecutor whom President Trump had nominated to serve as United States Attorney) shared those concerns. There were also reports that the testimony of a key witness did not support the Government's case. Substantial reporting indicates that Mr. Siebert understood that President Trump would fire him as a result of his decision not to bring the case. Mr. Siebert resigned on Friday, September 18, 2025. On that same day, the then First Assistant United States Attorney ("FAUSA"), Maya Song, who, upon information and belief, similarly shared concerns about the merits of the putative prosecution of Mr. Comey, was demoted to line attorney.

Although the President's improper, inflammatory and inaccurate statements about this matter are numerous, one need only look at a handful of social media posts by the President to understand the blatantly vindictive nature of this prosecution. First, in a post that apparently was intended to be addressed to the Attorney General alone, but was released more broadly on social media, the President demanded that action be taken by the DOJ against his critics and that he wanted Lindsey Halligan, a lawyer then assigned to the White House staff, to be part of those prosecutions:

> Pam: I have reviewed over 30 statements and posts saying that, essentially, 'same old story as last time, all talk, no action.' Nothing is being done. What about Comey, Adam 'Shifty' Schiff, Leticia??? They're all guilty as hell, but nothing is going to be done. Then we almost put in a Democrat supported U.S. Attorney, in Virginia, with a really bad Republican past. A Woke RINO, who was never going to do his job.
>
> … Lindsey Halligan is a really good lawyer… We can't delay any longer, it's killing our reputation and credibility. They impeached me twice, and indicted me (5 times!), OVER NOTHING. JUSTICE MUST BE SERVED, NOW!!! President DJT

See Truth Social Post by the President on 9/20/25 at 6:44 pm.[2]

Thereafter, that same evening, President Trump announced on social media that he would appoint Lindsey Halligan as "United States Attorney," noting that he needed a "tough prosecutor" to "get things moving," despite her having no experience as a prosecutor.[3] And, again that evening, when asked about his social media posts, President Trump stated to reporters, "I just want people to act, they have to act and we want to act fast. One way or the other. They're guilty, they're not guilty. We have to act fast."[4]

So, on September 22, 2025, Lindsey Halligan was sworn in as United States Attorney for the EDVA.[5] Three days later, on September 25, 2025, President Trump continued his entirely improper public comments concerning Mr. Comey, including stating, "I think I'd be allowed to get involved if I want, I don't really choose to do so. I can only say that Comey is a bad person. He's a sick person."[6] Within hours, Mr. Comey was indicted on two counts on the basis of a grand jury presentation by Ms. Halligan, evidently without the participation of any other prosecutor assisting her before the grand jury. The grand jury returned a no true bill on one of three proposed counts. The two counts were approved by a mere 14 votes each.

The indictment was followed by a series of additional improper public comments by the President concerning the case, including one social media post stating that Mr. Comey is "one of the worst human beings this Country has ever been exposed to" and that he was a "former Corrupt Head of the FBI."[7]

The Defense Theory of the Case

By way of a brief overview, it is the defense's position, grounded in facts that are largely public already, that:

First, you were unlawfully appointed Interim United States Attorney for the express but improper purpose of pursuing a vindictive and/or selective prosecution of Mr. Comey based on insufficient (or no) evidence, all in retaliation for Mr. Comey exercising his First Amendment rights to criticize the President.

Second, it is our position that this prosecution entirely lacks merit to the point that there was no probable cause to support it, a fact that we intend to establish that both supports claims of vindictive and/or selective prosecution and provides an independent basis for dismissal. Relatedly, based upon a thorough review of the underlying facts known to us, it already appears that the Indictment that was returned could only have been obtained if the grand jury was affirmatively misled about the facts, the controlling law, or both. While to-date you have not responded to my September 27, 2025, email asking for identification of Person 3 in the Indictment, for example, we believe that if either Andrew McCabe or Daniel Richman is Person 3, that their prior statements to the Government were exculpatory.

Finally, the Government's collective effort – led by the President – to demonize Mr. Comey repeatedly both before and after his indictment is a circumstance (thankfully) without precedent in American history. Those blatantly improper statements are both an independent basis for a claim of outrageous Government conduct but also further proof of the unlawfully vindictive and/or selective nature of this prosecution.

Notably, we also seek to preserve these documents for the claim we will bring under the Hyde Amendment against the Government after our client is vindicated.

Defense Discovery Requests

While reserving all rights to seek additional discovery and amend our theory of the case, we briefly outline the categories of the defense's requests for discovery below followed by more detailed descriptions of each:

(1) Any and all documents and communications that relate to the purported appointment of Lindsey Halligan as Acting or Interim United States Attorney or otherwise purports to invest Lindsey Halligan with the authority to investigate, charge, and/or prosecute this case;

(2) Any and all documents and communications relating to whether probable cause supports the prosecution, including but not limited to, all internal memoranda discussing that issue or recommending that a prosecution of this case proceed or be declined;

(3) Any and all documents and communications concerning the grand jury presentation, including any documents indicating whether exculpatory evidence would be and was presented to the grand jury;[8]

(4) Any and all documents and communications concerning President Trump's personal hostility to James Comey;

(5) Any and all documents and communications reflecting the DOJ's awareness of the views of President Trump or members of his administration concerning his desire to prosecute persons he deemed his opponents (including, but not limited to, James Comey) and the DOJ's efforts to comply with the President's wishes as well as fears of DOJ personnel of the consequences if they failed to do so;

(6) Any and all documents and communications concerning the appointment of Maggie Cleary as Acting United States Attorney for the Eastern District of Virginia including, but not limited to, any discussion of the likelihood that she would bring charges against James Comey or Letitia James if so appointed, as well as any documents reflecting frustration or disappointment with her after her appointment when, as publicly reported, she expressed concerns about a prosecution;

(7) Any and all documents concerning the decisions to purport to appoint Lindsey Halligan as Interim or Acting United States Attorney including, but not limited to, any discussion of the likelihood that she would bring charges against James Comey or Letitia James;[9]

(8) Any and all documents and communications by the Federal Bureau of Investigation ("FBI") or DOJ to President Trump or his staff following President Trump's public comments or posts about James Comey from September 1, 2025, forward; and

(9) Any and all documents and communications reflecting any effort to delete documents or posts concerning this case by anyone at DOJ (including the FBI or the White House).[10]

The defense now details these categories of discovery requests below.

* * *

DOCUMENT CATEGORY ONE: DOCUMENTS PURPORTING TO APPOINT LINDSEY HALLIGAN ACTING OR INTERIM UNITED STATES ATTORNEY OR OTHERWISE PURPORTING TO AUTHORIZE MS. HALLIGAN TO INVESTIGATE, CHARGE, OR PROSECUTE THIS CASE

A core issue in this case is whether Interim United States Attorney Lindsey Halligan was lawfully appointed and, if not, what remedy should obtain. *See United States v. Giraud*, Crim No. 24-768 (MWB)(D.N.J.) (opinion dated August 21, 2025) and *United States v. Garcia*, Crim No. 2:25-CR-00230-DGC-BNW (opinion dated September 30, 2025). Accordingly, we seek any and all documents purporting to empower Ms. Halligan to investigate, charge and prosecute this case. The relevance of responsive documents to our motion to challenge Ms. Halligan's appointment is self-evident. In addition, any effort by the Attorney General to appoint Ms. Halligan with knowledge that the Attorney General lacked the legal authority to do so would be relevant to other putative motions, including a vindictive prosecution motion, a selective prosecution motion, and an outrageous government conduct motion.

Accordingly, in addition to the standard Rule 16 discovery that we are entitled to receive promptly, we believe that we are entitled to receive the following categories of documents pursuant to Rule 16 and *Brady* and its progeny, all of which are material to Mr. Comey's ability to defend this case in pretrial motion practice and/or at trial:

(1) Any and all documents and communications concerning the appointment of Ms. Halligan as Acting or Interim United States Attorney;

(2) Any and all documents and communications, including the dates and precise times of creation, purporting to authorize Ms. Halligan to investigate, authorize, or prosecute this case in any manner;

(3) Any and all documents and communications involving or concerning Ms. Halligan while still employed at the White House as to what she would plan to do if appointed as Acting or Interim United States Attorney for the EDVA:

(4) Any and all documents and communications to which personnel of the Executive Office of the President of the United States were a party concerning that Office's expectations of Ms. Halligan as it relates to the prosecution of Mr. Comey, or any actions Ms. Halligan was expected, hoped, or promised to take if Ms. Halligan was appointed Acting or Interim United States Attorney for the EDVA;

(5) Any and all documents and communications reflecting the date and precise time when United States Attorney Erik Siebert resigned and/or was terminated and the reasons for that resignation and/or termination;

(6) Any and all documents reflecting the date and precise time when First Assistant United States Attorney Maya Song was demoted from her position as First Assistant United States Attorney to line Assistant United States Attorney, and the reasons for that demotion;

(7) Any and all documents reflecting the date and precise time when a successor First Assistant United States Attorney, acting or otherwise, was named and appointed following the demotion of Ms. Song, and the reasons for that appointment;

(8) Any and all documents and communications indicating that the demotion of Maya Song was in any way related to either: (1) her assessment of the merits of the putative case against Mr. Comey; or (2) to avoid having her succeed to the position of United States Attorney pursuant to the Federal Vacancies Reform Act, 5 U.S.C. 3345 et *seq.*) or both;

(9) Any and all documents and communications (or memoranda of understanding related to the same), including their dates and precise times of creation, reflecting any delegations of authority from the Attorney General to anyone from January 1, 2025, to present – including, but not limited to, as Special Attorney to the Attorney General or Special Assistant United States Attorney under 28 U.S.C. 509, 510, 515, et seq. – to investigate, charge, or prosecute cases in the EDVA.

(10) Any and all documents and communications from January 1, 2025, to present by DOJ or the Executive Office of the President of the United States related to the Office of Legal Counsel ("OLC") opinion dated November 13, 1986, authored by then Deputy Assistant Attorney General Samuel A. Alito, Jr.

CATEGORY TWO: DOCUMENTS CONCERNING THE LACK OF PROBABLE CAUSE OR GOOD FAITH BASIS TO PROCEED

We believe the evidence underlying the two counts Mr. Comey faces will fail to amount even to probable cause, let alone beyond a reasonable doubt. So too did most of the DOJ, according to public reporting.

In the September 27, 2025, article titled, "Trump Overcame Internal Dissent To Get His Case Against Comey: The Comey family has emerged as one of Trump's biggest targets for retribution in his second term" (hereafter "WSJ Article"), for example, the *Wall Street Journal* reported:

- "President Trump asked advisers directly last week: Where were the prosecutions that he wanted to see? He had been hearing from allies that the Justice Department wasn't moving aggressively against the people who had investigated and prosecuted him, according to people familiar with the matter. Chief among them was former Federal Bureau of Investigation Director James Comey. Senior Justice Department officials told him the evidence against Comey wasn't a slam dunk, and prosecutors in Virginia didn't want to bring the case. Other White House officials worried that such a case could end badly. Trump told the DOJ officials to make the best case they could, officials said. He said any lack of evidence was just like what he faced in his own criminal cases, the people said."
- "The Trump-appointed U.S. attorney in the Eastern District of Virginia, Erik Siebert, had told colleagues he didn't see a case against Comey or Democratic New York Attorney General Letitia James, people familiar with the matter said."
- "On [Lindsey Halligan's] first day as U.S. attorney, career prosecutors in the office presented her with a detailed memo outlining that they hadn't found probable cause to support charging Comey and explained that securing a conviction would be even harder, people familiar with the matter said. They also noted it would raise ethical issues."

This reporting, many others like it, and the defense's own review of the facts call into question whether the government had a good faith basis to proceed with the case. The defense requests:

(1) Any and all documents and communications addressing whether the putative prosecution of Mr. Comey lacked probable cause or a good faith basis to proceed, including, but not limited to, any indication that pursuit of the prosecution would violate either DOJ norms or ethics rules, or both. The request includes but is not limited to, all internal memoranda discussing those issues whether done by any member of the prosecution team individually or as a collective effort.
   a. Upon information and belief from media reporting, this should at least include the prosecution team's prosecution and/or declination memo as well as any memo or other document prepared by or for Acting United States Attorney and then First Assistant United States Attorney Maggie Cleary, and any notes prepared in connection with or taken during briefings for Ms. Cleary and/or Ms. Halligan. The request also includes and all other documents and communications indicating the views of all the attorneys involved in the prosecution, including, but not limited to:
      i. Attorney General Pam Bondi
      ii. Deputy Attorney General Todd Blanche
      iii. United States Attorney Erik Siebert for EDVA,
      iv. Maggie Cleary (named as Acting United States Attorney for EDVA)
      v. Lindsey Halligan (named as Interim United States Attorney for EDVA)
      vi. Maya Song (First Assistant United States Attorney for EDVA)
      vii. Brian Samuels (Criminal Chief for EDVA)
      viii. Assistant United States Attorney ("AUSA") Lisa McKeel (EDVA)
      ix. AUSA Patrick McGorman (EDVA)
      x. Edward R. Martin and any other members of the "Weaponization Task Force"[11];

(2) This request also includes all documents and communications reflecting the views of AUSAs or DOJ attorneys (from any part of DOJ or any other United States Attorney's Office) who were asked to participate in the prosecution in any way but declined or otherwise expressed reservations about participation. This request includes, but is not limited to, attorneys who refused to participate in the presentation of the case to the grand jury or who declined to sign the indictment or declined to join the prosecution team after indictment[12]; and

(3) This request also includes all documents and communications reflecting the views of all investigative personnel of the FBI or contract employees thereof or any other law enforcement agency involved in the investigation.

CATEGORY THREE: DOCUMENTS CONCERNING THE PRESENTATION TO THE GRAND JURY

Relatedly, considering the unprecedented circumstances surrounding this case and the general lack of inculpatory evidence related to the two counts Mr. Comey faces, the nature of the government's presentation to the grand jury is inherently suspect. The defense requests:

(1) Any and all documents, communications, or other items concerning the grand jury presentation, specifically including, but not limited to, any and all notes, transcripts and audio recordings of the grand jury proceeding (including all witness testimony, all exhibits, all legal instructions and any colloquy between the prosecutors and the grand jury members);

(2) Any and all documents and communications discussing or indicating which government employees appeared before the grand jury related to this case on September 25, 2025.

(3) Any and all documents and communications indicating whether the prosecutor should disclose exculpatory evidence to the grand jury hearing this case, including, but not limited to, whether to disclose to the grand jury: (a) the statements of Daniel Richman; (b) the statements of James Comey; and (c) the statements and impeachment information concerning Andrew McCabe;

(4) Any and all documents and communications discussing whether the grand jury should hear directly from the witness Daniel Richman;

(5) Any and all documents and communications discussing whether or not to engage with defense counsel for Mr. Comey prior to returning the indictment, including, but not limited to, whether such notice should not be provided to avoid the risk that Mr. Comey would ask to testify before the grand jury.

(6) Any and all documents and communications discussing whether to provide notice to Mr. Comey as a target that an indictment would be sought, including, but not limited to, whether such notice should not be provided to avoid the risk that Mr. Comey would ask to testify before the grand jury.

CATEGORY FOUR: DOCUMENTS CONCERNING VINDICTIVE AND/OR SELECTIVE PROSECUTION

As noted above, all of these arguments and discovery requests, though sufficient on their own to warrant dismissal of the charges against Mr. Comey, also relate to the government's overarching effort to vindictively and/or selectively prosecute Mr. Comey. "To establish prosecutorial vindictiveness, a defendant must show, through objective evidence, that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus." *United States v. Villa*, 70 F.4th 704, 708-09 (4th Cir. 2023) (cleaned up). "Absent this kind of direct evidence, a defendant may state a claim indirectly with evidence of circumstances from which an improper vindictive motive may be presumed." *Id.* at 709 (cleaned up). The above detailed facts related to the vindictive and selective nature of this prosecution are but a small sample of what exists in the public domain. The government's discovery obligations reach far further than publicly available information. The defense hereby requests:

(1) Any and all documents and communications reflecting the DOJ's awareness of the views of President Trump or members of his administration concerning President Trump's desire to prosecute persons he deemed his opponents—including, but not limited to, James Comey, Letitia James (Attorney General for New York), United States Senator Adam Schiff, John Brennan (former Director of Central Intelligence), John Bolton (former National Security Advisor); and Christopher Wray (former Director of the FBI);

(2) This request, includes, but is not limited to, any and all documents and communications discussing the potential prosecution of more than one of the above named people in the same document;[13]

(3) That request includes, but is not limited to, any and all documents and communications that list more than one of the above named people in the same document (whether or not the document describes itself as a "list");

(4) That request includes, but is not limited to, any and all documents and communications that discuss the priority and sequencing of putative prosecutions of more than one of the above named people;

(5) The above request specifically includes, but is not limited to, documents and communications involving any of the following: President Trump, Stephen Miller (White House Deputy Chief of Staff), Attorney General Pam Bondi, Deputy Attorney General Todd Blanche, FBI Director Kash Patel, Edward R. Martin and any members of their respective staffs;

(6) The above request specifically includes documents and communications reflecting receipt and/or awareness by DOJ personnel of such communications or posts of whatever form by the President (including "Truth Social" posts) and the actions or reactions to such posts by any DOJ personnel;

(7) The above request specifically includes documents and communications concerning communications by President Trump to DOJ personnel that were not posted to the public;

(8) The above request specifically includes documents and communications concerning how to communicate prosecution decisions back to the President and the actual communications with the President about: (i) concerns by the prosecution team that the case was not appropriate for prosecution; and (ii) developments concerning the effort to seek an indictment. This request includes, but is not limited to, any documents and communications reflecting fear or concern by members of the FBI (including its contractors), DOJ (including EDVA) considering the putative prosecution as to President's reaction to any hesitation to prosecute (including a decision not to prosecute)[14];

(9) The above request specifically includes documents and communications about how Mr. Comey would be arrested and whether or not an opportunity would be sought to make an arrest in a public place or in a manner that would allow Mr. Comey to be photographed;

(10) The above requests specifically include all documents and communications concerning the possible or actual termination, demotion, or criticism of prosecutors who expressed concern about proceeding with the prosecution, specifically including, but not limited to, any of the following:
   a. Attorney General Pam Bondi;
   b. Deputy Attorney General Todd Blanche;
   c. United States Attorney Erik Siebert;
   d. Interim United States Attorney Maggie Cleary;
   e. Acting United States Attorney Lindsey Halligan;
   f. First Assistant United States Attorney Maya Song;
   g. Criminal Chief Brian Samuels;
   h. AUSA Lisa McKeel; and
   i. AUSA Patrick McGowan

(11) The above request specifically includes copies of all public postings concerning the Comey investigation and the Comey prosecution by officials in the Trump administration, including but not limited to:
   a. President Trump
   b. Vice President J.D. Vance
   c. Attorney General Pam Bondi
   d. FBI Director Kash Patel
   e. Deputy Attorney General Todd Blanche
   f. United States Attorney Lindsey Halligan
   g. White House Deputy Chief of Staff Stephen Miller
   h. Edward R. Martin

(12) The above request specifically includes any and all documents and communications related to similarly situated individuals the DOJ did not initiate prosecutions against by way of complaint or indictment. This request includes, among others, all documents and communications concerning the investigation of and/or decision not to charge any individuals from September 30, 2020 to present for allegations of perjury, false statements, and/or obstructing a congressional proceeding. This request includes copies of all referrals and documents and communications regarding all referrals to DOJ by Congress (both Republicans and Democrats) from September 30, 2020, to present for potential investigation regarding allegations of perjury, false statements, and/or obstructing a congressional proceeding.

CATEGORY FIVE: DOCUMENTS CONCERNING PRESIDENT TRUMP'S HOSTILITY TO JAMES COMEY

(1) All documents and communications reflecting President Trump's hostility to James Comey;

(2) All documents and communications reflecting that during the first Trump Administration, President Trump and his staff sought to have James Comey investigated by the DOJ and/or audited by the IRS;

(3) All documents and communications reflecting that during the first Trump Administration, any member of the Administration (including, but not limited to, then Chief of Staff John F. Kelly) cautioned President Trump against directing the DOJ or IRS to investigate or prosecute perceived enemies, including but not limited to, James Comey. This request would specifically include a memo produced by Don McGahn, then White House Counsel, addressing efforts to pursue prosecutions of Trump's perceived adversaries, including, but not limited to, James Comey;

(4) All documents and communications concerning the decision to terminate Maurene Comey from her position as an Assistant United States Attorney in the Southern District of New York that indicate in any way that her relationship to her father, Mr. Comey, was a factor or considered in any way;

(5) All documents and communications indicating that anyone in the DOJ, EDVA, FBI, or the White House was in communication with persons outside the Government about the potential prosecution of Mr. Comey from July 2025 forward to the present date, including, but not limited to, any communications involving:
   i. Lara Loomer[15]
   ii. Peter Navarro[16]
   iii. Mike Davis[17]
   iv. Julie Kelly[18]
   v. Any member of the media

(6) All documents and communications concerning pressure from President Trump and/or his staff and/or DOJ (including Ed Martin and the "Weaponization Working Group") to terminate Michael Ben'Ary and the DOJ decision to terminate Michael Ben'Ary from his position as an Assistant United States Attorney in the Eastern District of Virginia that – as reported by CNN on October 1, 2025: "Justice Department fires prosecutor falsely tied to Comey case in social media post" – indicate in any way that his purported connection to the investigation of Mr. Comey was a factor or considered in any way in connection with the termination of his DOJ employment;[19]

CATEGORY SIX: DOCUMENTS CONCERNING OUTRAGEOUS CONDUCT INCLUDING REPEATED PREJUDICIAL STATEMENTS BY THE PRESIDENT

(1) All documents and communications concerning communications to the White House expressing either approval or disapproval of the President's social media posts concerning Mr. Comey;

(2) The above request specifically includes, but is not limited to, any DOJ input, suggestions or edits to any of the President's statements or any comments to the President or his staff about the posts before or after they were published;

(3) The above request specifically includes, but is not limited to, any DOJ suggestion to retract or delete any of the President's statements or any comments;

(4) The above request specifically includes, but is not limited to, any DOJ suggestion to disseminate or amplify any of the President's statements or comments;

(5) Copies of all "talking points" or other briefing materials or suggested points to be made (whether "on background," "on deep background," or "off the record," or on the record) to media outlets before, during or after the Indictment of Mr. Comey.

CATEGORY SEVEN: DOCUMENTS CONCERNING PRIOR INCONSISTENT POSITIONS TAKEN BY THE GOVERNMENT

(1) All documents that reflect the government's prior positions concerning the credibility of Andrew McCabe's testimony and/or statements, including but not limited to, the draft indictment of Andrew McCabe which, upon information and belief, received a "no true bill" in September 2019.

CATEGORY EIGHT: ADDITIONAL MATERIAL REQUESTED PURSUANT TO RULE 16 AND *BRADY v. MARYLAND*

(1) All statements or testimony (including any recorded statements, reports of statements, and/or notes of statements taken by agents or attorneys) obtained from Andrew McCabe;

(2) All statements or testimony (including any recorded statements, reports of statements, and/or notes of statements taken by agents or attorneys) obtained from Daniel Richman;

(3) All statements or testimony (including any recorded statements, reports of statements, and/or notes of statements taken by agents or attorneys) concerning the putative prosecution of Mr. Comey obtained from any United States Senator or Senate staff member.

(4) All statements of any witness inconsistent with the government's allegations in Counts One and Two, including but not limited to:
   a. Any and all statements by Daniel Richman indicating that he did not need permission or authorization to talk to the media about matters outside the scope of his part-time engagement by the FBI as an unpaid policy advisor;
   b. Any and all statements by Daniel Richman indicating that James Comey never asked, "authorized," or directed him to be an "anonymous source" concerning the Clinton email investigation or the Russian investigation;
   c. Any and all statements by Andrew McCabe indicating (either explicitly or by omission) that McCabe had not authorized the disclosure of information to a Wall Street Journal reporter in 2016; and
   d. Any and all statements by Andrew McCabe indicating (either explicitly or by omission) that he had not informed James Comey of his plan to authorize the disclosure of information to a Wall Street Journal reporter prior to the publication of the October 2016 article.

These discovery requests and obligations under federal law extend to the Executive Office of the President of the United States and the "DOJ,"—to include, but not be limited to, personnel at the Department of Justice's "Main Justice" headquarters; the United States Attorney's Office for the EDVA and other United States Attorney's Offices where relevant personnel may have been reassigned, detailed, or returned for employment during the relevant time period; the "Weaponization Working Group" (established by Attorney General Pam Bondi on February 5, 2025)[20]; and the FBI (including its employees and contractors).

This letter serves as notice to you, and any of your agents, representatives, employees, and others who have acted or purported to act on your behalf, that you have a duty to preserve any and all information, communications, documents and/or electronically stored information (ESI) (hereafter collectively referred to as "documents") that may be relevant to the claims and defenses in this matter, that are in your custody, possession and control, including within the categories set forth below. Please take any and all steps necessary to ensure that all documents are obtained and produced or if you disagree that a category of documents be produced, then promptly advise us of the disagreement but obtain and preserve the documents. The destruction or loss of potentially relevant documents (including electronic documents, such as emails and computer files) – even if inadvertent – could subject you to significant sanctions. You must also cease any efforts to destroy or otherwise dispose of possibly relevant information.

It is imperative that you take steps to prevent the automatic, intentional or accidental destruction of documents, including any routine operations that may cause the loss of documents, tangible items or ESI. Particular care must be taken to preserve the relevant documents of employees who have resigned, been terminated, or reassigned.

This preservation obligation extends to all forms of communication, including text messages, Microsoft Team messages, and any form of ephemeral messaging (e.g. Signal, Telegram), and that obligation applies to all relevant messages regardless of whether they exist or existed on a personal or government-issued device. Relatedly, this preservation obligation and request for documents and communications extends to evidence members of the DOJ or Executive Office of the President of the United States communicated internally or across agencies on end-to-end encrypted messaging applications with deleting messages, failing to preserve federal records as required by federal law. *See* 44 U.S.C. Chapter 31, *et seq.*

cc:
Maggie Cleary, Esq.
Brian Samuels, Esq.
Jessica Carmichael, Esq,

_/S/____________________
Patrick J. Fitzgerald

Footnotes

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[1] In that regard, on September 17, 2025, I wrote the DOJ to ask for a meeting to discuss why the case should not be brought but never received a substantive response, much less a meeting.

[2] https://truthsocial.com/@realDonaldTrump/posts/115239044548033727

[3] https://truthsocial.com/@realDonaldTrump/posts/115239306164275142

[4] https://www.youtube.com/watch?v=vnnMHG0GnkQ

[5] https://www.politico.com/news/2025/09/22/bondi-taps-lindsey-halligan-federal-prosecutor-00575547https://www.politico.com/news/2025/09/22/bondi-taps-lindsey-halligan-federal-prosecutor-00575547. (In the interim, on September 20, 2025, on the heels of the departure of Mr. Siebert, Margaret Cleary, a former local prosecutor and Assistant United States Attorney from the Western District of Virginia, was appointed by the Attorney General to serve as the Acting United States Attorney for EDVA. Like Mr. Siebert, and like the other career prosecutors in that office, Ms. Cleary reportedly expressed her concerns about the merits of the proposed prosecution of Mr. Comey.)

[6] https://www.youtube.com/watch?v=UEHplff4Rpo (at 23:11)

[7] https://truthsocial.com/@realDonaldTrump/posts/115267513846352215

[8] See my email to you dated September 24, 2025.

[9] https://truthsocial.com/@realDonaldTrump/posts/115239044548033727

[10] https://www.foxnews.com/politics/trump-pressures-bondi-prosecute-adversaries-now-deleted-social-media-post-theyre-all-guilty-hell

[11] *See* WSJ Article: "Tensions over the case came to a head last week after some administration officials, including Ed Martin, a Justice Department official pursuing cases of interest to Trump, privately told the president that the Justice Department was slow-walking cases against Trump critics, people familiar with the discussions said."

[12] *See* WSJ Article: "She presented the case by herself and was the only prosecutor in the U.S. attorney's office to put her name on the indictment."

[13] There is no *a priori* reason why DOJ, acting independently of the President and consistent with DOJ norms, should be discussing the putative prosecution of Senator Adam Schiff for a purported mortgage fraud in 2012 (which we understand Senator Schiff vigorously denies) and a putative prosecution of Mr. Comey for alleged false statements in 2020 Congressional testimony (which we vigorously deny) as related matters.

[14] *See* WSJ Article: "The indictment Thursday sent shock waves through the office, leaving some prosecutors questioning how long they would remain in their jobs and concerned about future political pressure in cases large and small"

[15] *See* Laura Loomer X Account: "This comes 2 months after my pressure campaign on Pam Blondi to fire Comey's daughter and Comey's son-in-law from the DOJ," Loomer boasted in a X post on Wednesday."

[16] *See* WRAL News: "Trump's trade adviser Peter Navarro this week called for Comey to be imprisoned for a host of Trumpworld grievances – many of which federal prosecutors have previously looked at and didn't find reason to charge. Navarro previously did time in federal prison for refusing to comply with congressional subpoenas in the investigation into efforts to overturn the 2020 presidential election leading into the January 6, 2021, US Capitol riot. 'There's a lot of people out there who should be in prison in my judgment, and I think in the judgement of many people in the Trump Administration,' Navarro said. 'James Comey's at the top of that list now.'"

[17] *See* WSJ article: "President Trump campaigned on the fact that he's going to have his Justice Department bring accountability for the lawfare against him and he's delivering on his promise," said Mike Davis, a Republican legal activist and Trump ally. "Retribution is a critical component of justice." Davis said it was a "good thing" that Trump now has a Justice Department that listens to him and does what he says.

[18] *See* https://x.com/julie_kelly2/status/1973469997985853474

[19] *See* https://www.cnn.com/2025/10/01/politics/justice-department-prosecutor-fired-comey-case

[20] https://www.justice.gov/ag/media/1388506/dl?inline

Exhibit 2

PATRICK J. FITZGERALD, ESQ.

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Lindsey Halligan, Esq.
United States Attorney
Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, VA 22314

October 29, 2025

Re: United States v. James Comey; No. 1:25-CR-272

Dear Ms. Halligan:

We write to supplement the defense's prior letter to you, dated October 2, 2025 (hereafter "The Document Request"), in relation to the above-referenced matter. We write to make specific additional requests to preserve and produce certain documents highly relevant to core issues we intend to raise in this case. In particular, we supplement the Document Request as follows:

First, we broaden the definition of the government to explicitly include the United States Attorney's Office for the Western District of Virginia ("WDVA") throughout the letter.

Second, we broaden the definition of the government to explicitly include the "Interagency Weaponization Working Group," and any other such entity, regardless of name, which includes officials from the Office of the Director of National Intelligence ("ODNI"), the Department of Justice ("DOJ"), the Federal Bureau of Investigation (the "FBI"), and the Central Intelligence Agency ("CIA") and which conducted any intelligence or criminal investigation or inquiry concerning Mr. Comey. The definition of government in the letter is broadened to include any agency that participated in such working groups.

Third, we supplement Document Category One ("Any and all documents and communications that relate to the purported appointment of Lindsey Halligan as Acting or Interim United States Attorney or otherwise purports to invest Lindsey Halligan with the authority to investigate, charge, and/or prosecute this case") to also include:

(1) Any and all documents concerning the demotion of Zachary Lee from the position of First Assistant United States Attorney ("FAUSA") in WDVA and the reasons for that demotion as well as any and all documents reflecting an effort to further demote or marginalize Mr. Lee and to seek his dismissal or resignation;

(2) Any and all documents concerning the selection of Robert Tracci as FAUSA in WDVA and the reason for his selection; and

(3) Any and all documents concerning the resignation of interim United States Attorney Todd Gilbert, including, but not limited to, documents indicating that he would be terminated if he did not resign and the reasons why that action was taken.

Fourth, we supplement Document Category Two ("Any and all documents and communications relating to whether probable cause supports the prosecution, including but not limited to, all internal memoranda discussing that issue or recommending that a prosecution of this case proceed or be declined") by:

(1) Broadening the requests in subsections 1, 2, and 3 of Category Two to also include any and all documents and communications addressing whether there was a sufficient basis for either a criminal investigation or a grand jury investigation into the circumstances concerning the storage and/or potential destruction of documents in various rooms at FBI headquarters;

(2) Adding subsection 4 of Category Two to also include any and all documents and communications in Serial 113 that constitute "internal communications" produced by the FBI Insider Threat Office on October 15, 2025, as referenced in Serial 133 dated October 17, 2025, for the following individuals:

[redacted]

(3) Amending the list of prosecutors under 1(a) at p. 9 of the Document Request to add:
   (a) Todd Gilbert (United States Attorney for W.D. Va.);
   (b) Zachary Lee (former First Assistant United States Attorney for W.D. Va.);
   (c) Robert Tracci (First Assistant United States Attorney for W.D. Va.);
   (d) Katie Medearis (Criminal Chief for W.D. Va.);
   (e) Laura Taylor (Civil Chief for W.D. Va.); and
   (f) Vito Aiai (Assistant United States Attorney for W.D. Va.).

Fifth, we supplement Document Category Four ("Any and all documents and communications concerning President Trump's personal hostility to James Comey") to include:

(1) Any and all documents concerning the potential prosecutions of the following individuals for allegedly making false statements, committing perjury or otherwise obstructing justice for testimony provided to Congress by:
   (a) Jeff Sessions (former Attorney General);
   (b) Steve Mnuchin (former Treasury Secretary);
   (c) Scott Pruitt (former Administrator of the Environmental Protection Agency); and
   (d) Tom Price (former Secretary of Health and Human Services);

The relevant materials include, but are not limited to:
   (a) Transcripts of the relevant testimony;
   (b) Any and all documents or exhibits or records of statements or testimony that tends to prove the testimony of the above official was false;
   (c) Any and all criminal referrals made regarding the above individuals;
   (d) Any and all records of any investigative steps taken regarding the alleged false testimony;
   (e) Any and all records of any investigative steps considered but not taken in relation to the alleged false testimony;
   (f) Any and all prosecution or declination memos concerning the alleged false testimony; and
   (g) Any and all records of communications between the DOJ and/or the FBI on one hand and the White House on the other concerning the above investigations.

Sixth, we supplement the Document Request to add Document Category Ten, which requests any and all documents concerning any potential sources for the media articles produced in discovery, as detailed below.

Seventh, we supplement the Document Request to add Document Category Eleven, which requests any and all documents concerning a potential privilege taint in this matter, as detailed below.

Eighth, we supplement the Document Request to add Document Category Twelve, which requests any and all documents concerning the Counterintelligence Operational Leads (CIOLs) and classified documents pertaining to the Clinton investigation and Trump campaign that were provided to, brought to the attention of, or reviewed by Mr. Comey in 2016.

* * *

CATEGORY TEN: ANY AND ALL DOCUMENTS CONCERNING ANY POTENTIAL SOURCES FOR ANY OF THE MEDIA ARTICLES PRODUCED IN DISCOVERY.

Count One of the indictment charges Mr. Comey with "falsely stating that he, JAMES B. COMEY, JR., had not 'authorized someone else at the FBI to be an anonymous source in news reports regarding the FBI investigation concerning [Hillary Clinton].'" ECF No. 1 at 1. The indictment alleges that this "statement was false, because, as JAMES B. COMEY JR. then and there knew, he in fact had authorized [Daniel Richman] to serve as an anonymous source in news reports regarding an FBI investigation concerning [Hillary Clinton]." *Id.* To date, the government has produced numerous publicly available media articles, many of which reference anonymous sources. In fact, the government spent years investigating whether Mr. Richman was an anonymous source for certain of those articles, and ended that investigation with no criminal charges. Mr. Comey is entitled to any information possessed by the government regarding the potential other anonymous sources used in creating any articles for which the government contends Mr. Richman served as an anonymous source.

Accordingly, for each article the government contends includes anonymous source information provided by Mr. Richman with the authorization of Mr. Comey, in addition to the standard Rule 16 discovery that we are entitled to receive promptly, we are entitled to receive the following categories of documents pursuant to Rule 16 and *Brady* and its progeny, all of which are material to Mr. Comey's ability to defend this case in pretrial motion practice and/or at trial:

(1) Any and all documents reflecting access by any government personnel to the information that appeared in such articles;

(2) Any and all documents concerning communications between any of those potential sources and the media;

(3) Any and all documents reflecting interviews (including proffers) of, or testimony by, those potential sources or their refusals to be interviewed or to provide testimony;

(4) Any and all phone records or emails gathered concerning those potential sources;

(5) Any and all telephone records or texts or emails or any metadata gathered concerning the reporters or contributors for those articles;

(6) Any and all records of polygraph examinations conducted of such potential sources or refusals by such potential sources to be polygraphed; and

(7) Any and all analyses of potential prosecutions of the other sources.

CATEGORY ELEVEN: ANY AND ALL DOCUMENTS CONCERNING A POTENTIAL PRIVILEGE TAINT IN THIS MATTER.

As set forth in the discovery produced to date, on September 25, 2025, Special Agent [redacted] notified the FBI's Office of General Counsel (OGC) about a potential privilege spill. Specifically, Agent [redacted] reported that "evidence obtained in the Government's investigation of James Comey may constitute attorney-client privileged or attorney-client confidential information" in addition to "attorney work-product information." 000002088. On September 29, 2025, OGC replied with guidance for Agent [redacted] and Senior Advisor [redacted], including that those exposed to the privileged information "are not to discuss any information that may [be privileged]," that they should not contribute to the "drafting of any legal process," should not "serve as an affiant with regard to any potential legal process," and that a "taint attorney" would be appointed. We are entitled to the following information pursuant to Rule 16 and *Brady* and its progeny, all of which is material to Mr. Comey's ability to defend this case in pretrial motion practice and/or at trial, including to assess the extent of the taint and the government's apparent mishandling of privileged information to assess his remedies:

(1) Any and all documents concerning the exposure of any member of the prosecution team (whether attorney, agent, support staff or other position) to any evidence that might contain attorney-client privileged information, attorney-client communications, or attorney-client work product, including, but not limited to, documents concerning:
   (a) The time and date of each and every exposure and the identity of the document or communication at issue and the identity of the person exposed;
   (b) All steps taken to remedy such exposure; and
   (c) Whether Agent [redacted], Mr. [redacted], or any others exposed to Mr. Comey's privileged material contributed to the drafting of legal process, testified in any proceeding (including before the grand jury), or served as the affiant in this matter on or after September 25, 2025.

CATEGORY TWELVE: ANY AND ALL DOCUMENTS CONCERNING CIOLs AND CLASSIFIED DOCUMENTS PERTAINING TO THE MIDYEAR EXAM INVESTIGATION, HILLARY CLINTON, AND CROSSFIRE HURRICANE THAT WERE PROVIDED TO, BROUGHT TO THE ATTENTION OF, OR REVIEWED BY MR. COMEY IN 2016, AS WELL AS ANY AND ALL OTHER DOCUMENTS AND COMMUNICATIONS RECEIVED BY MR. COMEY AS DIRECTOR OF THE FBI IN THE SUMMER AND EARLY FALL OF 2016.

The indictment alleges in Count Two that Mr. Comey obstructed justice by "making false and misleading statements" before the Senate Judiciary Committee on September 30, 2020. ECF No. 1 at 2. Although the government has failed to specify which of Mr. Comey's statements on September 30, 2020 it believes were false, it has thus far produced documents related to a CIOL dated September 7, 2016, which Mr. Comey was questioned about in the September 30, 2020 Senate Judiciary Committee hearing. *See* Tr. at 2:51:45-2:52:35.

If the government intends to present evidence as part of its case in chief at trial regarding the CIOL dated September 7, 2016 that Mr. Comey was questioned about in the September 30, 2020 Senate Judiciary Committee hearing, Mr. Comey is entitled to any and all documents that would rebut the inference that this CIOL was memorable to him as of September 30, 2020. Therefore, to the extent Count Two (or any other aspect of the government's case in chief) is premised on the September 7, 2016 CIOL, in addition to the standard Rule 16 discovery that we are entitled to receive promptly, we are entitled to receive the following categories of documents pursuant to Rule 16 and *Brady* and its progeny, all of which are material to Mr. Comey's ability to defend this case in pretrial motion practice and/or at trial:

(1) Any and all documents reflecting Mr. Comey's receipt or review of CIOLs concerning the Midyear Exam investigation, Hillary Clinton, or the Crossfire Hurricane investigation between January 1, 2016 and September 30, 2016, including but not limited to:
   (a) The CIOLs themselves; and
   (b) Documentation reflecting Mr. Comey's receipt or review thereof;

(2) Any and all documents reflecting Mr. Comey's receipt or review of classified information concerning the Midyear Exam investigation, Hillary Clinton, or the Crossfire Hurricane investigation between January 1, 2016 and September 30, 2016;

(3) Any and all documents reflecting discussion involving Mr. Comey of CIOLs concerning the Midyear Exam investigation, Hillary Clinton, or the Crossfire Hurricane investigation between January 1, 2016 and September 30, 2016;

(4) Any and all documents reflecting discussion involving Mr. Comey of classified information concerning the Midyear Exam investigation, Hillary Clinton, or the Crossfire Hurricane investigation between January 1, 2016 and September 30, 2016; and

(5) Any and all communications or documents received by Mr. Comey in his capacity as Director of the FBI between July 1, 2016 and September 30, 2016. "Communications" as used in this sub-request five includes, but is not limited to:
   (a) Emails;
   (b) Phone calls;
   (c) Text messages;
   (d) Records of oral communications;
   (e) Meeting invitations and calendar entries; and
   (f) Hard copies of written communications delivered to Mr. Comey or his staff.

Sincerely,

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Exhibit 3

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Tyler Lemons, Esq.
Gabriel Diaz, Esq.
Assistant United States Attorneys
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November 12, 2025

Re: United States v. James Comey; No. 1:25-CR-272

Dear Mr. Lemons and Mr. Diaz:

We write to supplement the defense's prior letters to you, dated October 2, 2025 and October 29, 2025 (hereafter, "the Document Requests"), in relation to the above-referenced matter. We write to make specific additional requests to preserve and produce certain documents highly relevant to core issues we intend to raise in this case. In particular, we supplement the Document Requests as follows:

CATEGORY THIRTEEN: ANY AND ALL DOCUMENTS CONCERNING THE EVIDENCE DESTROYED IN RELATION TO THE ARCTIC HAZE INVESTIGATION.

An FBI 302 Report, dated October 12, 2025, reports that "the District of Columbia United States Attorneys Office [was] 'freaking out' when the [Arctic Haze] case was declined for prosecution and in the process of being closed, with an Assistant United States Attorney telling [the lead agent in the Arctic Haze investigation] to ensure that any grand jury materials relating to members of the media were destroyed." *See* FD-302 Report Serial 110 at -26505.

The defense is aware of news reporting indicating that the government, in what appears to be the Arctic Haze investigation, obtained certain records from New York Times reporters, Matt Apuzzo, Michael Schmidt, Adam Goldman, and Eric Lichtblau. Matt Apuzzo, et al., *Comey Tried to Shield the F.B.I. From Politics. Then He Shaped an Election*, N.Y. Times (April 22, 2017). We are also aware that you have produced to us excerpts of Mr. Schmidt's records. *See* Comey Grand Jury Exhibit ("GJX") 251B at -5561–69. As such, we request the following:

(1) Please provide a detailed accounting of phone records the government obtained for members of the news media in any investigation relevant to this case, including but not limited to Arctic Haze and Tropic Vortex, including the names of the members of the news media whose records were obtained, the type of record, and the date those records were obtained, and whether the government still possesses those records in any form.

(2) Please provide a detailed accounting of any and all evidence that was "destroyed" during or at the conclusion of the Arctic Haze investigation, or at any time in any investigation relevant to this case, including the authority under which such evidence was destroyed, who directed the destruction of those records, how the records were destroyed, and the date on which the evidence was destroyed.

Sincerely,

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Exhibit 4

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November 19, 2025

Re: United States v. James Comey; No. 1:25-CR-272

Dear Mr. Lemons and Mr. Diaz:

We write to supplement the defense's prior letters to you, dated October 2, 2025, October 29, 2025, and November 12, 2025 (hereafter, "the Document Requests"), in relation to the above-referenced matter. We write to make specific additional requests to preserve and produce certain documents highly relevant to core issues we intend to raise in this case. In particular, we supplement the Document Requests as follows:

CATEGORY FOURTEEN: ENTIRE CASE FILE FOR ARCTIC HAZE, DURHAM SPECIAL COUNSEL, AND THIS INVESTIGATION.

Based on discovery produced to date, we understand that the government views the prior investigations conducted by the U.S. Attorney's Office for the District of Columbia referred to as "Arctic Haze," and the John H. Durham Special Counsel investigation into the origins of "Crossfire Hurricane" (the "Durham Investigation"), as relevant to the instant investigation. Although we have repeatedly asked the government to provide the factual bases for Counts One and Two with specificity so that we may prepare a defense in connection with the upcoming trial, the government has declined to do so. Moreover, the government has opposed the defense's motion for a bill of particulars. Given the government's refusal to provide the defendant with notice of the conduct the government intends to prove at trial, the defense is left to make necessarily broad discovery requests. To the extent the government narrows or provides the specific factual bases for the charges, the defense will be able to narrow these requests. As such, we request the following:

(1) Please produce the entire FBI case file for the Arctic Haze investigation, the Durham Investigation, and the 2025 investigation of Mr. Comey leading to these charges. To the extent materials are classified, we request that they be declassified in their entirety forthwith. To the extent particular items of information cannot be declassified in full, we request that the government identify those materials and provide an explanation for why that item or portion of item cannot be declassified.

(2) With respect to compartmented information held at the Department of Justice, we request a declassification review forthwith so that it may be declassified, or declassified to a lesser classification.

(3) With respect to defense Category Twelve, which we understand from our November 12, 2025 meet and confer that you are working to provide relevant numbers with respect to, we seek to review the underlying CIOLs for 2016 in their entirety, and reserve our right to seek declassification of those CIOLs.

Sincerely,

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Counsel for Defendant James B. Comey, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America,	)	
	)	
v.	)	Case No.: 1:25-CR-00272-MSN
	)	
James B. Comey, Jr.,	)	
	)	
Defendant.	)	
	)	

JAMES B. COMEY, JR.'S MOTION TO SEAL

Pursuant to the Protective Order entered in this matter, ECF No. 40, James B. Comey, Jr. moves this Honorable Court to seal the redacted portions of Exhibit 2 to Mr. Comey's Reply in Support of his Motion for Bill of Particulars. The redacted portions of Exhibit 2 contain information that the government may argue is subject to the Protective Order and required to be filed under seal. *See* ECF No. 40.

The Court has the inherent power to seal materials submitted to it. *See Times Mirror Company v. United States*, 873 F.2d 1210 (9th Cir. 1989); *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980); *In re Braughton*, 520 F.2d 765, 766 (9th Cir. 1975).

A proposed Order is attached for the consideration of the Court.

Dated: November 20, 2025

Respectfully submitted,

JAMES B. COMEY, JR.
By Counsel

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Counsel for Defendant James B. Comey, Jr.

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of November, 2025, a true copy of the foregoing document was filed electronically through the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jessica N. Carmichael
Jessica N. Carmichael

Counsel for Defendant James B. Comey, Jr.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA, : Criminal Action
: No. 1:25-cr-00272-MSN
v. :
:
JAMES B. COMEY, JR., : September 25, 2025
: 6:47 p.m. - 6:54 p.m.
Defendant. :
:
..............................:

TRANSCRIPT OF RETURN OF GRAND JURY INDICTMENT PROCEEDINGS
BEFORE THE HONORABLE LINDSEY R. VAALA,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the United States: UNITED STATES ATTORNEY'S OFFICE
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United States Attorney
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Alexandria, VA 22314

Court Reporter: Diane Salters, B.S., CSR, RPR, RCR
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Proceedings reported by machine shorthand from an FTR Gold recording. Transcript produced by computer-aided transcription.

THE COURTROOM DEPUTY: *United States v. James B. Comey, Jr.*, a true bill, signed foreperson, charging the defendant with false statements within the jurisdiction of the legislative branch of the United States government and obstruction of a congressional proceeding.

Madam Foreperson, are there any other matters for the Court at this time?

THE FOREPERSON: No, ma'am.

THE COURTROOM DEPUTY: Thank you.

THE COURT: Good evening.

THE FOREPERSON: Good evening.

THE COURT: If you could come to the podium, please, just so we can record you.

I know you've been through this before.

THE FOREPERSON: Yes.

THE COURT: And we're recording everything because I don't have a court reporter.

I know you've had a long day. How are you doing? I don't think I've seen you since my last duty week.

THE FOREPERSON: We're doing good. Thank you.

THE COURT: Good.

So you've been through the returns process before.

THE FOREPERSON: Yes.

THE COURT: As always, I ask several questions to ensure the integrity of the process. I'm going to ask you those questions now, okay?

For each count, was a quorum of the grand jury members present?

THE FOREPERSON: Yes, ma'am.

THE COURT: And for each count and for each defendant for all of the indictments, did a sufficient number, meaning at least 12, of grand jurors return a true bill?

THE FOREPERSON: One exception.

THE COURT: What is the exception?

THE FOREPERSON: James Comey, Jr., on Count One.

THE COURT: Okay. I'm going to ask you about that again in a minute.

Any there other indictments that haven't been presented to the Court this evening?

THE FOREPERSON: No, ma'am.

THE COURT: Okay. When you say one count -- so I'm looking at two different -- I'm looking at case 25-cr-272, *United States of America v. James B. Comey, Jr.* I have an indictment with two counts that my courtroom deputy read that looks to be signed by you, ma'am.

THE FOREPERSON: Yes.

THE COURT: And it says 14 grand jurors concurred in the indictment.

And then I have a report of a grand jury's failure to concur in an indictment, and it just reports that -- has three counts, and it says that the grand jurors did not concur in finding an indictment in this case.

THE FOREPERSON: So the three counts should be just one count. It was the very first count that we did not agree on, and the Count Two and Three were then put in a different package, which we agreed on.

THE COURT: So you --

THE FOREPERSON: So they separated it.

THE COURT: Sorry, I didn't mean to interrupt you.

So you voted on the one that has the two counts?

THE FOREPERSON: Yes.

THE COURT: Okay. And you're just giving me the other one for what reason?

THE FOREPERSON: That we could not agree on.

THE COURT: Okay. But just for one count?

THE FOREPERSON: Yes.

THE COURT: Okay. I may have another question for you in a minute, but you can have a seat. Thank you.

Who's here for the government this evening?

MS. HALLIGAN: Lindsey Halligan.

THE COURT: Okay. Please come to the podium, please.

So this has never happened before. I've been handed two documents that are in the Mr. Comey case that are inconsistent with one another. There seems to be a discrepancy. They're both signed by the foreperson. The one that says it's a failure to concur in an indictment, it doesn't say with respect to one count. It looks like they failed to concur across all three counts, so I'm a little confused as to why I was handed two things with the same case number that are inconsistent.

MS. HALLIGAN: So I only reviewed the one with the two counts that our office redrafted when we found out about the two -- two counts that were true billed, and I signed that one. I did not see the other one. I don't know where that came from.

THE COURT: You didn't see it?

MS. HALLIGAN: I did not see that one.

THE COURT: So your office didn't prepare the indictment that they --

MS. HALLIGAN: No, no, no -- I -- no, I prepared three counts. I only signed the one -- the two-count. I don't know which one with three counts you have in your hands.

THE COURT: Okay. It has your signature on it.

MS. HALLIGAN: Okay. Well...

THE COURT: So I think, to clean up the record here, what needs to happen, Madam Foreperson, is -- if I understand correctly, and I don't want to put words in your mouth -- you're saying that the one that says there's a failure to concur in an indictment, you only mean with respect to Count One --

THE FOREPERSON: Correct.

THE COURT: -- of that indictment?

THE FOREPERSON: Yes, ma'am.

THE COURT: It has three counts. Okay.

What I need you to do is write on this piece of paper both the case number, which is 25-cr-272, but also no true bill as to Count One only, and then sign and date it so that it's clear, okay? So I'm going to hand it back up to the courtroom security officer and have you do that. You can have a seat.

Okay. All right. So for the record, Madam Foreperson, I now have a report that looks like you've handwritten -- a report that 12 or more grand jurors did not concur in finding an indictment in -- and then you've added in handwriting -- Count 1 only in this case. Is that correct?

THE FOREPERSON: Yes, ma'am.

THE COURT: Okay. Thank you.

With respect to this case, Ms. Halligan, since you've provided this to the Court, I assume you intended to make it public, so these both will go on the docket in -272 now that it's been presented in open court. I just want to make sure that you understand that and that was your intention.

MS. HALLIGAN: Okay. Understood.

THE COURT: Does the government have any other applications on any of these indictments today? I saw an arrest warrant was requested in 25-cr-269 and a summons in 25-cr-272, so the Clerk's Office will issue both of those, and nothing looks to be under seal, but I wanted to make sure that if you had any other applications or motions, you had an opportunity to tell me.

MS. HALLIGAN: None, none, none at this time.

THE COURT: Okay. All right. Thank you.

MS. HALLIGAN: Thank you.

THE COURT: Madam Foreperson, your grand jury has been empaneled for a while, and I always say, as you know, how grateful we are for your service. This is a very -- it's a late -- I don't think we've ever met this late, but the service that you-all are providing to the Court and to the country is indispensable, and so on behalf of myself and the rest of the judges, thank you very much for your service.

All right. We are adjourned. Thank you.

* * * * *

CERTIFICATE OF REPORTER

I, Diane Salters, hereby certify that the foregoing transcript of proceedings was prepared from an FTR Gold audio recording of proceedings in the above-entitled matter and was produced to the best of my ability.

/s/ Diane Salters
Diane Salters, CSR, RCR, RPR
Official Court Reporter

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA

v. **Criminal No. 1:25-CR-272-MSN**

JAMES B. COMEY, JR.

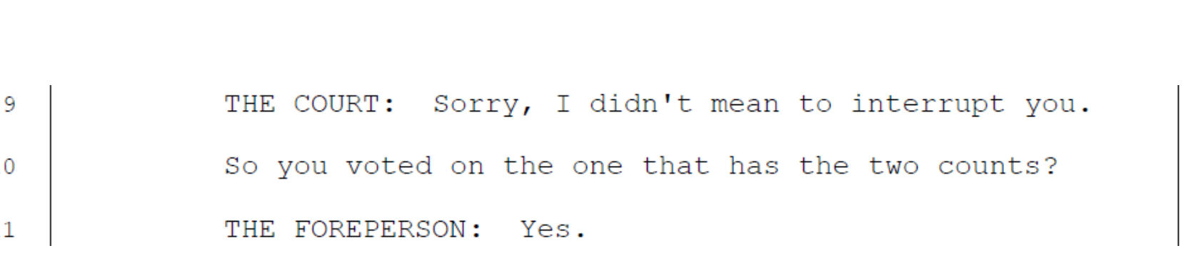
Defendant.

GOVERNMENT'S NOTICE CORRECTING THE RECORD

The government respectfully submits this supplemental filing to correct the record regarding statements during the hearing held on November 19, 2025, before U.S. District Court Judge Michael S. Nachmanoff, suggesting an issue with the grand jury voting process on the indictment returned in Case No. 1:25-CR-272-MSN. The official transcript of the September 25, 2025, proceedings before Magistrate Judge Vaala conclusively refutes that claim and establishes that the grand jury voted on – and true-billed – the two-count indictment.

I. The Court and the Foreperson Confirmed the Vote on the Two-Count Indictment

The transcript contains the following direct exchange between the Court and the grand jury foreperson:

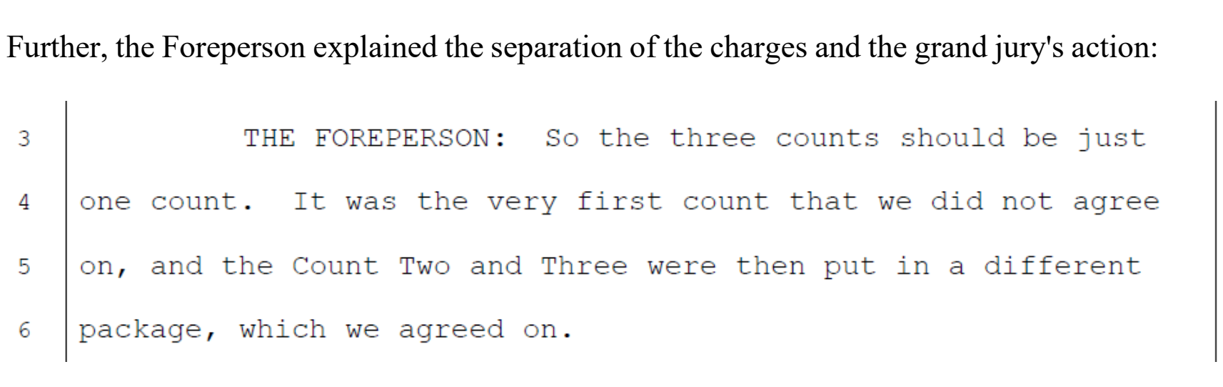


9 THE COURT: Sorry, I didn't mean to interrupt you.
10 So you voted on the one that has the two counts?
11 THE FOREPERSON: Yes.

See Transcript, Dkt No, 10, attached as Exhibit "A" at 4.

This sworn testimony alone establishes that the grand jury voted on the two-count indictment.

Further, the Foreperson explained the separation of the charges and the grand jury's action:



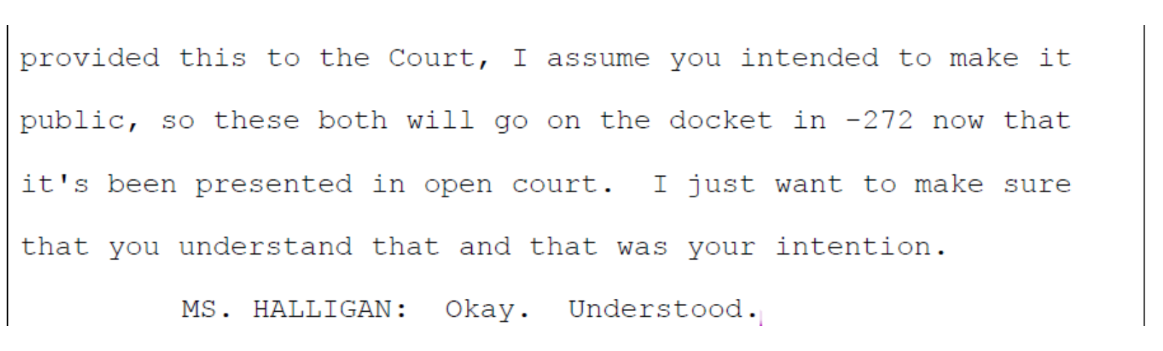
3 THE FOREPERSON: So the three counts should be just
4 one count. It was the very first count that we did not agree
5 on, and the Count Two and Three were then put in a different
6 package, which we agreed on.

Id.

This confirms that the grand jury failed to obtain concurrence on Count One, and that Counts Two and Three were placed into a separate two-count indictment that the grand jury approved.

II. The Court Acknowledged the Clerical Discrepancy and Directed That the Two-Count True Bill Be Docketed

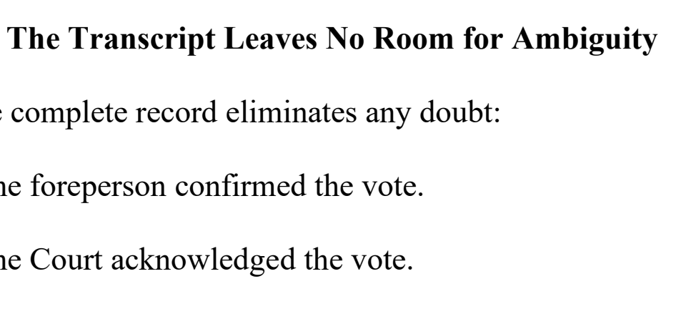
The Court acknowledged that two documents with the same case number had been presented, explaining:



3 concur across all three counts, so I'm a little confused as to
4 why I was handed two things with the same case number that are
5 inconsistent.

Id. at 5.

The Court then identified the issue as a clerical inconsistency relating solely to Count One and directed the foreperson to clarify that only Count One lacked concurrence. After resolving this narrow issue, the Court stated:



18 provided this to the Court, I assume you intended to make it
19 public, so these both will go on the docket in -272 now that
20 it's been presented in open court. I just want to make sure
21 that you understand that and that was your intention.
22 MS. HALLIGAN: Okay. Understood.

Id. at p. 6,18-22.

This confirms the Court's recognition that the two-count true bill is the valid, operative indictment.

III. The Transcript Leaves No Room for Ambiguity

The complete record eliminates any doubt:

- The foreperson confirmed the vote.
- The Court acknowledged the vote.
- The Court docketed the two-count true bill as the operative indictment.
- Only Count One lacked concurrence;

Counts Two and Three were true-billed by at least twelve jurors.

IV. Conclusion

Accordingly, any assertion that the grand jury "never voted on the two-count indictment" is contradicted by the official transcript. For the reasons stated herein, the government respectfully submits this Notice of Supplemental Filing so that the record accurately reflects the grand jury's vote on the two-count indictment and the proceedings held before Magistrate Judge Vaala on September 25, 2025.

Respectfully submitted this 20th day of November, 2025.

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CERTIFICATE OF SERVICE

This is to certify that I have this 20th day of November, 2025, the government served a copy of the foregoing upon the defendant by CM/ECF to:

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Counsel for Defendant

Patrick Joseph Fitzgerald
Counsel for Defendant

Rebekah Donaleski
Counsel for Defendant

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America,)
v.) Case No.: 1:25-CR-00272-MSN
James B. Comey, Jr.,)
Defendant.)

JAMES B. COMEY JR.'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR DISCLOSURE OF GRAND JURY PROCEEDINGS

INTRODUCTION

The government's misconduct in its quest to indict Mr. Comey shocks the conscience. The government conducted a warrantless search of privileged materials that no reasonable agent or prosecutor would conduct. It used those materials to present this case to the grand jury, and in so doing it magnified its violation of Mr. Comey's rights. It misstated basic principles of constitutional law to influence the grand jury. And it appears not to have presented any of the significant exculpatory evidence in this case. What is more, the government has now conceded that it did not even present the operative indictment to the grand jury, meaning no indictment was returned before the statute of limitations expired.[1] And adding to the irremediable flaws permeating this process, the Attorney General, twice, ratified the defective purported indictment through a post-hoc review that is legally incapable of rescuing this case. The record contains multiple particularized, factual bases to conclude that grounds may exist to dismiss the indictment based on the government's misconduct before the grand jury and overcome the presumption of grand jury secrecy. Pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(ii), disclosure of the grand jury proceedings is warranted.[2]

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ARGUMENT

I. THE GOVERNMENT'S RESPONSES LACK MERIT

A. The Government Misstated Key Issues of Law, and the Facial Deficiencies in the Indictment, as well as the Unusual Procedures Leading Up to its Return, Create a Particularized Basis for Believing the Government Misstated Others

Contrary to the government's argument (ECF No. 184 at 8-9) that any assertions about Ms. Halligan's misstatements of law rely on speculation, there is a particularized basis for believing that Ms. Halligan misstated key issues of law to the grand jury. At the outset, Ms. Halligan made at least two statements to the grand jurors that "on their face appear to be fundamental misstatements of the law that could compromise the integrity of the grand jury process." ECF No. 191 at 15-16 (highlighting Ms. Halligan's misstatements regarding Mr. Comey's Fifth Amendment rights and her inappropriate references to additional evidence the government would present at trial). In addition to Ms. Halligan's misstatements of fundamental criminal law principles, two sets of facts collectively raise a significant possibility that Ms. Halligan misstated material issues of law related to the particular charges at issue. ECF No. 106 at 14-17.

First, although the government cannot prove a violation of 18 U.S.C. § 1001(a)(2) unless it proves that Mr. Comey provided knowingly false responses to specific questions, Count One rests on questions that are, at minimum, ambiguous, as the government itself admits.[3] That feature of the indictment raises the risk that Ms. Halligan did not explain the requirement to the grand jury that a Section 1001 charge cannot rest on fundamentally ambiguous questions. *See id.* at 15; *see generally* ECF No. 105.

Second, the rushed and aberrant procedures leading up to the indictment create a risk that Ms. Halligan made additional prejudicial errors before the grand jury: The U.S. Attorney who determined that the government should not pursue criminal charges against Mr. Comey was forced out of office because of his judgment. Four days after her purported appointment, and with a direction from the President to proceed with haste, Ms. Halligan presented this case to the grand jury alone despite her lack of prosecutorial experience. According to Ms. Halligan's declaration regarding her grand jury conduct, ECF No. 188-1, the grand jury's deliberations in this case (approximately 2 hours and 12 minutes) were longer than the presentation itself (approximately 2 hours and 10 minutes). These prolonged deliberations over a relatively discreet set of charges and the closeness of the vote confirm the risk that grand jurors were misled about the law governing the task set before them. Finally, the grand jury failed to return a true bill on the presented indictment, ECF No. 3, and the government admitted to this Court on November 19, 2025, that it failed to present the second indictment to the grand jury for a vote, *see* ECF No. 207.[4]

The government errs by addressing some of those facts separately. The government argues that the indictment is not deficient because it "tracks the statutory language." ECF No. 184 at 9. And it suggests that the grand jury stayed late into the night simply because it was "engaged in a thoughtful, thorough, deliberative process." *Id.* at 10-11. But these arguments disregard the cumulative effect of the irregularities. Viewed as a whole, the full set of facts—each of which is unusual in isolation—raises the possibility that "suspect procedures were used before the grand jury." *See* ECF No. 106 at 16 (citing *United States v. Loc Tien Nguyen*, 314 F. Supp. 2d 612, 616 (E.D. Va. 2004)). To that argument, the government has no response. And the recent revelations that Ms. Halligan *did* make legal errors in her presentation that prejudiced Mr. Comey and provide bases to dismiss the indictment confirm that Mr. Comey has shown a particularized basis for disclosure of the proceedings.

B. The Government's Presentation of Evidence to the Grand Jury Reinforces the Other Irregularities and May Warrant Dismissal of the Indictment

Access to the grand jury materials is also warranted because there is a particularized reason to believe that the introduction of unconstitutional or privileged evidence before the grand jury—among the many other procedural irregularities—gives rise to a basis to dismiss the indictment. *See* ECF No. 89 at 2-7, ECF No. 171; *see also* ECF Nos. 165, 180 (transcripts of proceedings before Magistrate Judge Fitzpatrick). In its opposition to the instant motion, the government argues that Mr. Comey has offered only "vague and unsubstantial allegations of irregularity," which "do not show a particularized need for disclosure." ECF No. 184 at 6 (citations omitted). Magistrate Judge Fitzpatrick rejected that argument in favor of reviewing the grand jury materials *in camera* with the help of *ex parte* guidance from Mr. Comey. *See* ECF No. 180 at 3-6. Now, he has concluded that facts *do* establish a reasonable basis for Mr. Comey to challenge whether the government's conduct in 2019 and 2020 and now in 2025 may have violated the Fourth Amendment and whether that unconstitutional conduct prejudiced Mr. Comey given the "centrality" of the resulting materials to the government's grand jury presentation. ECF 191 at 20-21. Similarly, Magistrate Judge Fitzpatrick has concluded that facts establish a reasonable basis for Mr. Comey to challenge whether the government used privileged material, directly or indirectly, in its grand jury presentation in light of their likely insufficient steps to avoid the collection and review of those materials and their use of a potentially tainted agent as the testifying witness before the grand jury. *Id.* at 21-22. The Court here should similarly review the materials as part of the government's appeal and dismiss the government's deflection.

To be sure, "a facially valid indictment is not subject to dismissal simply because the grand jury may have considered improper evidence, or because it was presented with information or evidence that may contravene a constitutional privilege." *United States v. Jefferson*, 546 F.3d 300, 312 (4th Cir. 2008).[5] But there is a difference between "the mere fact that evidence . . . is unreliable," and violations of Mr. Comey's rights that "substantially influenced" the grand jury's decision to indict. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 (1988). In circumstances where the violation or violations "did substantially influence the decision, or if there is grave doubt that the decision to indict was free from such substantial influence," dismissal may be warranted. *Id.* at 263. Indeed, an indictment can be dismissed as a result of grand jury misconduct before the grand jury if "the government misconduct is widespread or extraordinarily serious." *United States v. Rice*, 90 F. App'x 921, 926 (6th Cir. 2004).

Here, the materials produced by the government in response to Magistrate Judge Fitzpatrick's orders reflect that, in September 2025, the government accessed Mr. Richman's materials, unfiltered for responsiveness or privilege, in preparation for grand jury in this matter, even though they did not have a warrant that authorized such a search. Agents knowingly reviewed and printed out dozens of pages of privileged communications between Mr. Comey and his lawyers and appear to have presented at least certain of those privileged communications to the grand jury in this matter. This misconduct is both "widespread [and] extraordinarily serious." *Id.* While it appears that this misconduct did prejudice Mr. Comey, it would be impossible to determine the extent of the government's misconduct and prejudice to Mr. Comey absent the defense's access to the grand jury materials given its unique understanding of both Mr. Comey's expectations of privacy and attorney-client privilege.

Equally concerning is what Ms. Halligan appears *not* to have presented to the grand jury. While she need not have presented all exculpatory evidence in her possession to the grand jury, she had an obligation not to mislead the grand jury through an improperly selective presentation of the evidence or to use a summary witness in a way that would discourage grand jurors from evaluating the underlying evidence. *Cf. Rice*, 90 F. App'x at 921. Indeed, it "is the policy of the Department of Justice . . . that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." Justice Manual § 9-11.233.

Based on the government's discovery to date, there appears to be numerous pieces of highly exculpatory evidence that—given its tendency to undermine the existence of probable cause—Ms. Halligan likely did not present to the grand jury, and without which the grand jury would have been left with a deeply misleading picture of the case. This exculpatory evidence includes, for instance, Mr. Richman's multiple statements in government interviews denying that Mr. Comey ever authorized him to serve as an anonymous source about the Clinton investigation while employed with the FBI; Mr. Richman's FBI Special Government Employee (SGE) paperwork indicating that he, in fact, was technically no longer an SGE as of June 30, 2016 (prior to the publication of *any* of the articles the government has relied on); and, as detailed at length below, the government's lack of *any* evidence that Mr. Comey received a document he claimed he did not recall—a statement the government now alleges was "false and misleading." ECF No. 1.

II. THE GOVERNMENT'S RECENT CONCESSIONS REGARDING COUNT TWO AND ITS CONDUCT BEFORE THE GRAND JURY REVEAL SIGNIFICANT IRREGULARITIES THAT MAY RESULT IN DISMISSAL

The irregularities described above alone warrant disclosure of the grand jury materials. But since Mr. Comey filed his motion, additional irregularities have emerged that reinforce the case for disclosure. In just the last week, the government has disclosed that to prove its obstruction charge in Count Two, it intends to rely only on Mr. Comey's statements to Senator Cruz at the 2020 Senate Judiciary hearing—the basis for Count One—as well as his statements at the same hearing that he did not recall receiving a certain counterintelligence operational lead ("CIOL") in 2016. But the grand jury determined that those latter statements were not false when it returned a no true bill rejecting an indictment that contained that count. The government has also conceded that Ms. Halligan never presented the operative indictment to the grand jury for a vote after the grand jury no billed the original indictment. These particularized facts further support a finding that the grand jury proceeding contained irregularities that could lead to dismissal of the indictment.

A. Background Regarding Count Two

Understanding the significance of the government's concession regarding Count Two requires additional background regarding the 2016 CIOL. We describe the complex chain of events surrounding the CIOL as a predicate for demonstrating the likelihood that, to the extent that grand jurors even considered the CIOL issue in connection with current Count Two, there is a strong likelihood that they were misled about it.

On June 14, 2016, the media reported that Russian government hackers had compromised the computer systems of the Democratic National Committee ("DNC") after having access to those computers for more than a year.[6] On July 5, Mr. Comey publicly announced the close of the "Midyear Exam" investigation into Hillary Clinton's handling of classified materials involving a private email server without criminal charges.[7] On July 27, then-candidate Trump publicly called for Russia to hack into U.S. information systems and to release more stolen emails from Ms. Clinton's private email server.[8] The Clinton campaign repeatedly and publicly criticized Trump for his apparent embrace of Russian interference in the 2016 election.[9]

In late July 2016, U.S. intelligence agencies "obtained insight into Russian intelligence analysis alleging that U.S. Presidential candidate Hillary Clinton had approved a campaign plan to stir up a scandal against U.S. Presidential candidate Donald Trump by tying him to Putin and the Russians' hacking of the Democratic National Committee." Letter from John Ratcliffe, Dir. Nat. Intel., to Sen. Lindsey Graham (Sept, 29, 2020) ("Ratcliffe Letter"), https://perma.cc/LB3H-BCDN. However, it was not clear to those intelligence agencies whether this information was accurate or exaggerated. *Id.*[10]

On September 7, 2016, this information was sent to the Federal Bureau of Investigation (FBI) via a CIOL regarding "U.S. Presidential candidate Hillary Clinton's approval of a plan concerning U.S. Presidential candidate Donald Trump and Russian hackers hampering U.S. elections as a means of distracting the public from her use of a private mail server." *Id.*

On September 30, 2020, Mr. Comey testified before the Senate Judiciary Committee about the Crossfire Hurricane counterintelligence investigation into alleged links between President Trump's 2016 campaign and the Russian government. *See Oversight of the Crossfire Hurricane Investigation: Day 3*, *Hearing Before the U.S. Senate Committee on the Judiciary*, 116th Cong. (Sept. 30, 2020), http://bit.ly/4o2ekHb. The night before, he was sent a copy of the Ratcliffe Letter, described above, which purported to summarize the September 7, 2016 CIOL in one sentence. Mr. Comey was not provided an opportunity to review the September 7, 2016 CIOL at issue prior to his testimony. The next day at the hearing, Senator Lindsey Graham questioned Mr. Comey about his alleged receipt of the CIOL, and asked:

> SEN GRAHAM: So do you recall getting an inquiry from the CI -- excuse me, the intelligence community in September of 2016 about a concern that the Clinton campaign was going to create a scandal regarding Trump and Russia?
>
> MR. COMEY: I do not.
>
> SEN GRAHAM: You don't remember getting a [sic] investigatory lead from the intelligence community? Hang on a second. Let me find my document here. September the 7th, 2016, the U.S. intelligence officials forwarded an investigative referral of FBI -- to FBI Director James Comey and direct -- Assistant Director of Counterintelligence Peter Strzok regarding U.S. presidential candidate Hillary Clinton's approval of a plan concerning U.S. presidential candidate Donald Trump and Russian hackers hampering U.S. elections as a means of distracting the public from her use of a private email server. You don't remember getting that or being taught -- that -- that (inaudible)...
>
> MR. COMEY: (inaudible) -- it doesn't ring any bells with me.

ECF No. 138-14 at 1. When Mr. Comey said that Senator Graham's question did not "ring any bells," the Senator incorrectly asserted that Mr. Comey had received "this inquiry from the intelligence community." *Id.* Mr. Comey later explained to Senator Graham, "I've read Mr. Ratcliffe's letter, which frankly I have trouble understanding." *Id*. at 3.

Later in the same hearing, Senator Hawley and Mr. Comey engaged in the following exchange:

> SEN HAWLEY: If I could, Mr. Chairman just one last thing I want to follow up on, the letter to Chairman Graham from John Ratcliffe, which I know you've seen Mr. Comey as you mentioned it earlier. Mr. Ratcliffe says "On 7th September 2016, U.S. intelligence officials forwarded an investigative referral to FBI Director James Comey regarding U.S. presidential candidate Hillary Clinton's approval of a plan concerning Donald Trump and Russian hackers as a means of distracting the public from her use of a private mail server," end quote. Did you open an investigation?
>
> MR. COMEY: I don't know what that refers to. I said earlier that does not ring any bells with me when I read that.
>
> SEN HAWLEY: You did not receive any investigative referral of this nature?
>
> MR. COMEY: I don't remember it. I don't remember receiving anything that is described in that letter.

Id. at 5.

Almost five years later, on September 25, 2025, the government sought to return the original indictment in this case, which included three counts. ECF No. 3. Count One of that indictment charged Mr. Comey with violating 18 U.S.C. § 1001(a), alleging that he lied to Congress when he stated that the September 2016 CIOL did not "ring any bells." *Id.* at 2. The proposed Count One misstated his prior testimony, changing his testimony from a statement that he did not remember that particular CIOL to alleged testimony that he did not remember "being taught" about the underlying topic. *Id.* The grand jury returned a no true bill, rejecting the indictment containing that count. *Id*. at 1.

There is no evidence whatsoever that Mr. Comey received the CIOL at issue, much less that he reviewed it. The materials in discovery make clear that every day, numerous CIOLs come to the FBI addressed to the Director—from a variety of federal agencies in a variety of formats—and are routed to employees other than the Director. Because the Midyear Exam investigation had been closed for more than two months, there is no reason to believe that any CIOL related to Ms. Clinton would have been sent to Mr. Comey (and the government has produced no proof that it was). There is no electronic trail showing that Mr. Comey received the CIOL at issue. There is no paper trail showing that he received it. And there is no witness who says that Mr. Comey either received it or discussed it with him. Full stop.

This total lack of evidence is extremely troubling in light of credible press reporting that not only does a declination memorandum exist in this case,[11] but it made clear that with respect to the CIOL in particular, a prior investigation found that Mr. Comey's statement could not support a false-statement charge because there was insufficient evidence Mr. Comey had ever

B. The Government's Recent Concessions Provide Further Bases to Disclose the Grand Jury Proceedings

The government's new revelations in the last week regarding its conduct before the grand jury and its intentions regarding charged Count Two are particularized facts that further support a finding of irregularities in the grand jury proceedings.

First, the government's concession that it never presented the operative indictment in this case to the grand jury for a vote is a death knell for the government's case, let alone sufficient reason to order disclosure of the grand jury proceedings. As will be detailed in both Mr. Comey's motion to dismiss and his opposition to the government's appeal of Magistrate Judge Fitzpatrick's order, failure to present the operative indictment violates both the constitutional requirement that no "person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," U.S. Const. Amend. V, and the legal requirement that a "grand jury may indict only if at least 12 jurors concur," Fed. R. Crim. P. 6(f).

Second, these irregularities are accentuated by the government's recent concession that it intends to rely on the CIOL testimony to prove charged Count Two. This disclosure and the resulting tension in the grand jury's no-billed indictment and claimed agreement with respect to Counts One and Two in the current indictment further crystalize the concerns regarding the government's grand jury conduct and how those concerns impacted the indictment and this case.[14] Once the grand jury found no probable cause that Mr. Comey's statements regarding the September 2016 CIOL were false, that finding would naturally bear on whether the grand jury would have relied on those statements to find Mr. Comey obstructed Congress with "false and misleading" statements. For that reason, it is likely the grand jury only found probable cause as to Count Two based on the one false statement they apparently true billed. Regardless, with no legal instructions from an authorized, experienced government attorney to grapple with this nuance after the no billed indictment, and no opportunity for the grand jury to even consider and vote upon the revised indictment, how Ms. Halligan *initially* instructed the grand jury as to the obstruction count is critical and will determine whether either of the potential two legs for Count Two remains.

Depending on how Ms. Halligan instructed the grand jury, the charged Count One conduct may be the *only* leg Count Two stands on. Mr. Comey has moved to dismiss charged Count One because it rests on literally true answers to fundamentally ambiguous questions and has moved to dismiss Count Two to the extent it relies on the same exchange as Count One. ECF No. 105. If the Court sustains those motions, it would end this case, because the government cannot constructively amend the indictment by obtaining a conviction at trial on broader grounds than those the grand jury considered. *See United States v. Simmons*, 11 F.4th 239, 268-69 (4th Cir. 2021); *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999) (only the grand jury may broaden or alter the charges in the indictment). And should the Court grant Mr. Comey's motion to dismiss Count One based on fundamental ambiguity and literal truth, Count Two would likely also fail given its reliance on the same legally flawed exchange.

Even if Ms. Halligan's presentation to the grand jury indicates that Count Two would still have one leg remaining—the no-billed statements—*how* Ms. Halligan discussed those statements and the legal contours of Count Two would inform whether Count Two can still state an offense under Federal Rule of Criminal Procedure 12. At the outset, there is evidence Ms. Halligan misrepresented to the grand jury Mr. Comey's statements to Senators Graham and Hawley as having never "been taught" about the subject of the CIOL. *See* ECF No. 3 at 2. That is factually inaccurate and any such error may have influenced not only how the grand jury assessed the false-statement charge, but also how the grand jury may have used that evidence to assess Count Two. Moreover, the grand jury's rejection of the false-statement count in original Count One indicates that it did not find probable cause that Mr. Comey knowingly made a false statement. So the government may be limited to arguing in Count Two that Mr. Comey's failure to recall receiving the CIOL was misleading (but not false), to avoid tension with the grand jury's finding as to the no-billed count. *See Simmons*, 11 F.4th at 268-69; *Randall*, 171 F.3d at 203. If so, the defense may have grounds to dismiss Count Two as failing to state an offense as required under Rule 12. In the specific context here—failure to recall a document the government cannot prove the defendant ever received—that statement can only be corruptly misleading if it is false. Put differently, truthfully stating one does not recall something *cannot* be misleading. Whether Count Two is so fatally flawed stems directly from how Ms. Halligan presented the case to the grand jury. The litany of errors that have surfaced just in the last week warrants close inspection of her conduct that initiated this case.

CONCLUSION

For the foregoing reasons, the government should be ordered to disclose to Mr. Comey the grand jury proceedings in this case.

Dated: November 20, 2025

Respectfully submitted,

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of November, 2025, a true copy of the foregoing document was filed electronically through the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jessica N. Carmichael
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Counsel for Defendant James B. Comey, Jr.

Footnotes

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[1] The absence of a valid charging instrument will be the basis of a forthcoming motion to dismiss.

[2] As the Court is aware, Mr. Comey will file his response to the government's appeal of Magistrate Judge Fitzpatrick's order for the government to disclose the grand jury proceedings on Friday, November 21, 2025. This reply brief responds to the government's arguments in opposition to the motion (ECF No. 184) to disclose the grand jury proceedings and highlights additional irregularities that have surfaced further warranting disclosure. Mr. Comey's response to the government's appeal of Magistrate Judge Fitzpatrick's order will explain why Judge Fitzpatrick's ruling is well supported by fact and law warranting affirmance and address the government's opposition to that ruling. These litigation streams present two related, but separate, avenues to order the government to produce the grand jury proceedings.

[3] Mr. Comey maintains that the questions are fundamentally ambiguous and, as a matter of law, cannot sustain this prosecution. But even on the government's reading, the compound questions and misstatements create ambiguity. The grand jurors should have been informed that ambiguity creates the risk that the government cannot validly charge a violation of Section 1001 so that they could make an informed decision.

[4] On November 20, the government filed a notice purporting to correct the record and asserting that, according to the transcript of the grand jury proceeding, the two-count indictment was presented to the grand jury. ECF No. 206. That notice contradicts numerous prior representations to this Court. The cited exchange in the grand jury proceeding does not support the government's new account and to the extent the two-count indictment was presented to the grand jury, there is no record of that presentment. *Contra* Fed. R. Crim. P. 6(e)(1).

[5] Crucially, this indictment is not facially valid, as it misstated the testimony at the heart of this case, *see* ECF No. 59 at 14-16, and, as noted, it is not even an "indictment" returned by the grand jury in accordance with the Fifth Amendment and the Federal Rules of Criminal Procedure. But even if the Court were to find the purported indictment facially valid, there is sufficient objective evidence to raise "grave doubt" that prosecutorial misconduct including the introduction of unconstitutional and privileged evidence prejudiced Mr. Comey. Thus, even if the Court finds that the indictment is facially valid, Mr. Comey is still entitled to disclosure of grand jury materials because of the particularized basis he has shown to pursue a claim under *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

[6] *See* Ellen Nakashima, *Russian government hackers penetrated DNC, stole opposition research on Trump*, Wash. Post (June 14, 2016), https://perma.cc/K922-4Z7T; Dmitri Alperovitch, *Bears in the Midst: Intrusion into the Democratic National Committee*, CrowdStrike Blog (June 14, 2016) (last updated June 5, 2020), https://perma.cc/EQB9-9AW4.

[7] James B. Comey, Director of the Federal Bureau of Investigation, Statement on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016), https://bit.ly/483H9fp.

[8] Michael Crowly & Tyler Pager, *Trump urges Russia to hack Clinton's email*, Politico (July 27, 2016), https://bit.ly/4oRgMR7; Jeremy Diamond & Stephen Collinson, *Democrats accuse Trump of disloyalty over Clinton emails*, CNN (July 28, 2018), https://bit.ly/48cF4fp.

[9] Rachel Witkin, *Hillary Clinton Suggests Alleged Russian Hacking is Designed to Help Trump*, NBC News (Sep. 6, 2016), https://perma.cc/LR2L-DK87.

[10] Indeed, it appears this information was created by Russian intelligence, and did not accurately reflect particular emails. *See* Charlie Savage & Adam Goldman, *'Clinton Plan' Emails Were Likely Made by Russian Spies, Declassified Report Shows*, N.Y. Times (July 31, 2025), https://perma.cc/F8AF-TLAF.

[11] The government's refusal to answer basic questions about the existence of this declination memorandum and decision to hide behind a flimsy claim of privilege to stonewall the Court's inquiries, *see* ECF No. 207, should be taken as confirmation that such a memorandum exists. *See* ECF No. 174 at 21.

[12] Katherine Faulders, et al., *Ex-special counsel John Durham undercut case against James Comey in interview with prosecutors: Sources*, ABC News (Oct. 6, 2025), https://perma.cc/M2JC-CQGQ.

[13] Katherine Faulders, et al., *Prosecutors' memo to new US attorney found no probable cause to charge James Comey: Sources* (Sept. 25, 2025), https://perma.cc/SKT5-LHAG.

[14] The inappropriateness of the government's reliance on no-billed conduct at trial and the limitations on its Count Two theory that Mr. Comey's statements were "false and misleading" after the grand jury's clear rejection of that allegation will be the subject of future motions *in limine*, to the extent this case proceeds.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America,)
)
v.) Case No.: 1:25-CR-00272-MSN
)
James B. Comey, Jr.,)
)
Defendant.)
)

JAMES B. COMEY, JR.'S NOTICE ON CIPA DEADLINES

James B. Comey, Jr., by and through undersigned counsel, submits this notice in response to the Court's November 19, 2025 Order directing the parties to submit a proposed Classified Information Procedures Act ("CIPA") briefing schedule. ECF No. 198. For the reasons that follow, Mr. Comey is not and does not expect to be in a position to file a Section 5 motion within two weeks, and respectfully requests that the Court set a status conference, pursuant to Section 2 of CIPA, for December 9, 2025, at which time the government can update the Court and the parties on its efforts to respond to the defense's declassification requests, the defense will have further opportunity to review the material produced by the government, and the parties can propose a CIPA schedule. The government consents to this motion.

Factual Background

As the Court is aware, the original CIPA schedule proposed by the parties on October 13, 2025, was premised on (1) Mr. Fitzgerald receiving his clearance in a timely fashion; and (2) that all classified materials are made available to the defense in a reasonable period of time. ECF No. 118. Mr. Fitzgerald received his final clearance on November 18, 2025. ECF No. 198. As noted in the defense's prior filing, the government made voluminous classified materials available to the defense, which are located in multiple different locations and required additional clearances and compartments. ECF No. 118. In that filing, the defense noted that because the defense is not aware of the contours of the government's case, and the government has declined to provide a bill of particulars, the defense made broader *Brady* and discovery requests to the government than it otherwise would have that called for the production of voluminous classified information based on its best guesses of what the government's case was about. *Id.*

Reasons for the Requested Hearing and Adjournment of Deadlines

The defense has worked diligently to review the materials produced by the government and meet and confer with the government regarding its discovery and *Brady* requests and requests for declassification. The government has declassified materials that are currently in the defense's secure compartmented information facility ("SCIF"), and the defense understands the government is working to declassify additional materials. Nonetheless, the defense is not in a position to file a Section 5, and will not be in the position to do so, unless and until the following occurs:

First, the government must produce the classified discovery at issue. On October 29, 2025, and November 19, 2025, the defense made discovery and *Brady* requests to the government that called for the production of additional classified information and the declassification of certain materials. *See* ECF No. 204-2 (Requests Eleven and Twelve) and 204-4 (Request Fourteen). With respect to the defense's requests, the government reported today, November 21, 2025, that they had requested authorization for the defense to have access to certain counterintelligence operational leads ("CIOLs"), but that they were held at high classification levels. Needless to say, to the extent Count Two relates to a CIOL, and Mr. Comey's purported memory of a CIOL, it is necessary for the defense to review the CIOL and any other relevant CIOLs. That has not happened.

Second, the government represents that it is working to declassify materials currently in the defense SCIF, including a portion of the Arctic Haze case file, in response to the defense's request. To the extent the government is able to declassify the materials the defense seeks, that would obviate the need for classified litigation and preserve judicial resources. The government represents that this is an ongoing process. The defense has requested that the government declassify the case file in this matter, the Arctic Haze matter, and the Durham Special Counsel investigation, and to the extent the government cannot declassify those materials, the defense has asked the government to identify those materials and why they cannot be declassified. ECF No. 204-2. The defense expects this will narrow the issues for any potential CIPA filing, but it has not yet occurred.

Third, as the Court is aware, the defense's Section 5 filing is a notice of the defense's intent to disclose classified information. *See* 18 U.S.C. App. III § 5. However, the defense SCIF contains considerable quantities of *unclassified* materials, both because they are marked as such or because they have since been declassified by the government. In the government's view, the defense must specifically identify the materials the defense believes are unclassified, so that the FBI may evaluate that designation and decide whether the defense can take unclassified material out of the SCIF. The defense, however, is not able to sift through voluminous materials in the SCIF, compare them to the 300,000 pages of discovery produced by the government (without a computer), and one-by-one identify what the government has already declassified or marked as unclassified. The government, on the other hand, knows what materials it has declassified and marked as unclassified. Moreover, the government has informed the defense that even materials that are marked as unclassified may, in fact, be classified depending on their proximity in substance to other materials, classified or unclassified. Such a moving target leaves the defense, and eventually the Court, unable to properly prepare for or engage in a Section 5 analysis if the government endorses what amounts to a "mosaic" theory of classification divorced from the actual classification markings on the documents themselves. In any event, the large and growing quantity of unclassified materials in the SCIF hampers the defense's ability to file a Section 5.

Fourth and most critically, the defense continues to be hampered by the government's refusal to provide a bill of particulars or factual basis for the charges at issue. The defense needs this information not only because trial is six weeks away, but of critical relevance here: the defense cannot tailor its requests to the government or Section 5 filing without knowing what the case is about. Absent this information, the defense may be left to file an extraordinarily broad Section 5, which would be necessitated by the government's failure to provide the proper notice and information to which the defense is entitled. That would not only be a waste of judicial resources, but of the defense's pretrial preparation time.

And *fifth*, the defense has requested that Mr. Comey be permitted to review and discuss the same classified materials that counsel has access to so that we may prepare his defense. The defense has asked the government to initiate that process as quickly as possible.

For these reasons, the defense asks that the Court set a Section 2 status hearing for December 9, 2025, following the oral argument on the remaining motions to discuss the above issues and set a proposed CIPA schedule. As noted, the government consents to this motion.

Dated: November 21, 2025 Respectfully submitted,

JAMES B. COMEY, JR.
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of November, 2025, a true copy of the foregoing document was filed electronically through the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jessica N. Carmichael
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Counsel for Defendant James B. Comey, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America,
v.
James B. Comey, Jr.,
Defendant.

Case No.: 1:25-CR-00272-MSN

JAMES B. COMEY, JR.'S RESPONSE TO THE GOVERNMENT'S OBJECTION TO JUDGE FITZPATRICK'S ORDER TO DISCLOSE GRAND JURY MATERIALS

James B. Comey, Jr., by and through undersigned counsel, respectfully files this response to the government's objection to Judge Fitzpatrick's order and opinion requiring the government to disclose grand jury materials to Mr. Comey. ECF Nos. 195, 193. Judge Fitzpatrick's 24-page, thoroughly reasoned opinion based on his own review of the grand jury materials, along with the parties' briefing and oral argument, is neither clearly erroneous nor contrary to law. ECF No. 191. This Court should deny the government's appeal and direct the disclosure of grand jury materials to the defense.

INTRODUCTION

Magistrate Judge Fitzpatrick issued a carefully reasoned, thorough opinion holding that particularized grounds exist to justify disclosure of the grand jury materials based on four different categories of government misconduct before the grand jury that may have prejudiced Mr. Comey. *See* ECF No. 191 at 21-22. The government now complains that "what began as the government's request for a filter protocol has morphed into a dispute regarding the defense's right to access grand jury materials." ECF No. 200 at 5. That is because the government's own pervasive misconduct has now been laid bare, only as a result of questions asked by the Court and the defense. In essence, the government wants to let the house burn down simply because they were not expecting the fire department to show up. The government's arguments lack merit, and there is no basis to find that Judge Fitzpatrick's opinion was contrary to law or clearly erroneous. The Court should deny the government's appeal and order the disclosure of the grand jury materials.

BACKGROUND

A. The Government's Filter Protocol Motion

This Court is familiar with the disputes surrounding the filter protocol. *See* ECF Nos. 38, 54, 58, 71, 102, 104, 132, 135, 160, 161, 165. On October 29, 2025, the Court appointed Judge Fitzpatrick "to preside over all proceedings related to the potential review of privileged materials in this case" and stated that "the government's proposed filter protocol raises several legal questions that must be resolved before any protocol is authorized." ECF No. 102 at 2.

B. Judge Fitzpatrick's *In Camera* Review of the Grand Jury Proceedings

On November 10, 2025, the parties filed briefs addressing the disclosure of grand jury materials. ECF Nos. 171, 172. In its brief, the government proposed that Judge Fitzpatrick review the grand jury materials *in camera* to aid his analysis. ECF No. 172 at 10-12. The same day, Judge Fitzpatrick held a telephonic hearing during which he granted the government's request to provide the grand jury materials to the Court for review. ECF No. 177.

Pursuant to Judge Fitzpatrick's order during the hearing, the defense filed an *ex parte* sealed submission to guide Judge Fitzpatrick's review, which was supplemented with evidence that the government had produced to the defendant, such as the privileged communications the government's agents printed out and used in September 2025 after their warrantless search of the materials seized from Daniel Richman.

C. Judge Fitzpatrick's Order and the Government's Appeal

After oral argument, briefing, and *in camera* review of grand jury materials, on November 17, 2025, Judge Fitzpatrick found that disclosure of the grand jury materials was warranted in a detailed memorandum opinion that provided the particularized and factually based grounds supporting disclosure. ECF No. 191 at 3. Judge Fitzpatrick accordingly ordered "that, by 3:00 p.m. on November 17, 2025, the Clerk of Court shall make available to the defense all grand jury materials filed on the docket under seal by the government" and that "the government shall, no later than 5:00 p.m. on November 17, 2025, produce to the defense the complete audio recording of the grand jury proceedings." ECF No. 193.

Minutes before the Clerk was scheduled to disclose the docketed grand jury materials, the government filed an emergency motion to stay the magistrate judge's order to allow the government to file objections pursuant to Fed. R. Crim. P. 59(a). ECF No. 195. The defense filed a response to the government's stay motion and, in the alternative, requested an expedited two-day briefing schedule. ECF No. 196. This Court granted the government's motion in part, staying Judge Fitzpatrick's order pending the resolution of any objections filed by the government. ECF No. 197. The Court ordered the government to file any objections to Judge Fitzpatrick's Order by 5:00 p.m. on November 19, 2025, and the defense to file any response by 5:00 p.m. on November 21, 2025. ECF No. 197. On November 19, 2025, the government filed its objection. ECF No. 200.

ARGUMENT

This Court may "modify or set aside" Judge Fitzpatrick's order only if it determines that the order "is contrary to law or clearly erroneous." Fed. R. Crim. P. 59(a). "A magistrate judge's order is clearly erroneous only when 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *SageWater, LLC v. Hossfeld*, No. 23-cv-00770, 2024 WL 4520646, at *1 (E.D. Va. Oct. 17, 2024) (Nachmanoff, J.) (citing *Attard Indus. v. United States Fire Ins. Co.*, No. 10-cv-121, 2010 WL 3069799, at *1 (E.D. Va. Aug. 5, 2010) (citations omitted)). An order "is contrary to law when the order 'fails to apply or misapplies relevant statutes, case law, or rules of procedure.'" *Id.*

Judge Fitzpatrick's order directing the government to disclose the grand jury materials was neither clearly erroneous nor contrary to law because—after a thorough review of the record—he found that "particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment." *United States v. Loc Tien Nguyen*, 314 F. Supp. 2d 612, 616 (E.D. Va. 2004) (citing *United States v. Abcasis*, 785 F. Supp. 1113, 1119 (E.D.N.Y. 1992)) (internal quotation marks omitted). The government's contrary arguments lack merit.

I. JUDGE FITZPATRICK'S ORDER WAS NEITHER CLEARLY ERRONEOUS NOR CONTRARY TO LAW

A. A Court May Order Disclosure of Grand Jury Materials if it Finds Irregularities Indicating that Prosecutors May Have Committed Misconduct that Prejudiced the Defendant

As Judge Fitzpatrick explained, Federal Rule of Criminal Procedure 6(e)(3)(E)(ii) "permits a court to authorize disclosure [of grand jury materials] 'at a time, in a manner, and subject to any other conditions that it directs . . . at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.'" ECF No. 191 at 3-4. That rule authorizes disclosure when a defendant "establish[es] that particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment." *Nguyen*, 314 F. Supp. 2d at 616 (citation omitted).

In turn, a court may dismiss an indictment when it finds that there was "prosecutorial misconduct and demonstrable prejudice or substantial threat thereof." *United States v. Goodson*, 204 F.3d 508, 515 (4th Cir. 2000) (citing *United States v. Hattrup*, 763 F.2d 376, 378 (9th Cir.1985) (Kennedy, J.)); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) ("I agree that every United States court has an inherent supervisory authority over the proceedings conducted before it, which assuredly includes the power to decline to proceed on the basis of an indictment obtained in violation of the law."). Although prosecutorial misconduct warranting dismissal of an indictment often involves the violation of a specific law or rule, courts have also found prejudice and dismissed indictments based on the "cumulative effect of . . . many instances of misconduct." *United States v. Breslin*, 916 F. Supp. 438, 446 (E.D. Pa. 1996); *see also United States v. Williams*, 504 U.S. 36, 46 (1992) (courts have the authority to "dismiss an indictment because of misconduct before the grand jury"); *United States v. Rice*, 90 F. App'x 921, 926 (6th Cir. 2004) (indictment could be dismissed because of grand jury misconduct when "the government misconduct is widespread or extraordinarily serious") (citation modified). Additionally, in certain circumstances, courts may presume prejudice when the misconduct at issue affects "the structural protections of the grand jury." *Bank of Nova Scotia*, 487 U.S. at 257.

Accordingly, a court may order disclosure of grand jury materials when it makes a particularized finding that there were irregularities in the grand jury proceedings indicating that prosecutors may have committed misconduct that prejudiced the defendant. That potential prejudice may arise from a single act of misconduct or from the cumulative effect of multiple instances of misconduct.

B. Judge Fitzpatrick's Extensive Findings Demonstrate that the Government May Have Committed Misconduct that Prejudiced Mr. Comey

Under that standard, Judge Fitzpatrick's order requiring disclosure of the grand jury materials was neither clearly erroneous nor contrary to law. After a careful review of the record, Judge Fitzpatrick made eleven particularized factual findings about the pervasive irregularities in the grand jury proceedings. *See* ECF No. 191 at 20-22. And as he explained throughout his opinion, those irregularities indicate that the government may have committed at least four kinds of misconduct that prejudiced Mr. Comey.

First, Judge Fitzpatrick found that the government's use of communications between Mr. Richman and Mr. Comey may have constituted misconduct that violates the Fourth Amendment. The government originally obtained those communications pursuant to 2019 and 2020 warrants that authorized it—as part of the Arctic Haze investigation—to search Mr. Richman's computer, iCloud, iPhone, iPad, and Columbia email accounts for evidence of potential violations of 18 U.S.C. § 641 and 18 U.S.C. § 793. *Id.* at 20. Judge Fitzpatrick found that the government's retention and use of those materials "establish a reasonable basis for the defense" to challenge the government's conduct as a "willful or reckless" violation of the Fourth Amendment. *See id.* at 20-21. That finding was correct because the Fourth Amendment prohibits the government from retaining and using materials it seized pursuant to a years-old warrant from a closed investigation, where those materials were not reviewed or segregated for responsiveness per the terms of the warrants. *United States v. Zelaya-Veliz*, 94 F.4th 321, 338 (4th Cir. 2024) (explaining that district courts "retain[] the authority to determine that prolonged retention of non-responsive data by the government violated the Fourth Amendment").

Judge Fitzpatrick also found that "given the centrality of these materials to the government's presentation," "the facts provide a reasonable basis for the defense to show that they were prejudiced by the government's use of the Richman materials in the grand jury." ECF No. 191 at 21; *see id.* at 14 (explaining "that the materials seized from the Richman Warrants were the cornerstone of the government's grand jury presentation"). That finding was correct because misconduct is prejudicial if it "substantially influenced the grand jury's decision to indict." *Bank of Nova Scotia*, 487 U.S. at 256 (citation omitted).

Second, Judge Fitzpatrick found that—independent of any potential Fourth Amendment violation—the government's use of communications between Mr. Richman and Mr. Comey may have constituted misconduct because they were potentially protected by the attorney-client privilege. Specifically, he found that "the facts establish a reasonable basis for the defense to challenge whether privileged information was used, directly or indirectly, by the government to prepare and present its grand jury presentation." ECF No. 191 at 21. That finding was correct because Mr. Richman was Mr. Comey's attorney at the time of the communications, and the Federal Rules of Evidence—as well as fundamental principles of criminal law—prohibit the government from relying on evidence protected by the attorney-client privilege. *In re Grand Jury Subpoena*, 341 F.3d 331, 335 (4th Cir. 2003) ("When the attorney-client privilege applies, it affords confidential communications between lawyer and client complete protection from disclosure." (citation omitted)). And as discussed, Judge Fitzpatrick correctly found that the presentation of those communications to the grand jury may have been prejudicial because they were central to the government's case. *See* ECF No 191 at 14, 21; *Bank of Nova Scotia*, 487 U.S. at 256.

Third, Judge Fitzpatrick found that the government may have committed misconduct because "the prosecutor made statements to the grand jurors that could reasonably form the basis for the defense to challenge whether the grand jury proceedings were infected with constitutional error." ECF No. 191 at 22; *see id.* at 15 (finding that Ms. Halligan "suggest[ed] to the grand jury that Mr. Comey does not have a Fifth Amendment right not to testify at trial"); *id.* at 16 (finding that Ms. Halligan "clearly suggested to the grand jury that they did not have to rely only on the record before them to determine probable cause"). That finding was correct because, "where a prosecutor's legal instruction to the grand jury seriously misstates the applicable law, the indictment is subject to dismissal if the misstatement casts 'grave doubt that the decision to indict was free from the substantial influence' of the erroneous instruction." *United States v. Stevens*, 771 F. Supp. 2d 556, 5667 (D. Md. 2011) (citing *United States v. Peralta*, 763 F. Supp. 14, 21 (S.D.N.Y. 1991)). Judge Fitzpatrick correctly determined that Ms. Halligan's suggestion about Mr. Comey's right to testify on its face may have been a misstatement of law because the Fifth Amendment guarantees defendants the right not to testify. *See Griffin v. California*, 380 U.S. 609, 615 (1965). And he correctly determined that Ms. Halligan's suggestions about the future availability of evidence at trial may have been a misstatement of law because "[o]nly the evidence presented to the grand jury in the grand jury room may be considered in determining whether to vote an indictment." Handbook for Grand Jurors Serving in the United States District Courts, U.S. District Court for the Eastern District of Virginia, at 7; *see also Cooper v. United States*, 247 F. 45, 47 (4th Cir. 1917) (explaining that under the Fifth Amendment, an "indictment can only be found upon the testimony of a competent and material witness or witnesses, who must be sworn and examined before the grand jury").

Judge Fitzpatrick also found that those misstatements may have substantially influenced the grand jury. *See* ECF No. 191 at 15-16. That finding was correct because they could have led the grand jury to believe that the government's case was stronger than it is—either because it thought the government could shift the burden to Mr. Comey to prove his innocence (thereby necessitating his taking the stand), *id.* at 15, or because it thought that it was allowed to find probable cause based on evidence not yet produced, *id.* at 16.

Fourth, Judge Fitzpatrick found that the government may have committed misconduct because "the grand jury transcript and recording likely do not reflect the full proceedings." ECF No. 191 at 22. He explained that "although it is clear that a second indictment was prepared and presented to the grand jury (ECF 3), the transcript and audio recording of the proceedings do not reflect any further communications after the grand jury began deliberating on the first indictment." *Id.* Subsequent developments have demonstrated that this irregularity could lead to dismissal. As further explained below and in Mr. Comey's contemporaneously filed Motion to Dismiss Indictment Based on Violation of the Fifth Amendment, the government never presented the operative two-count indictment to the grand jury. Its failure to do so warrants dismissal because "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V.

Judge Fitzpatrick concluded that even if none of those irregularities individually justified the disclosure of the grand jury materials, they "[c]ollectively . . . establish that 'ground[s] may exist to dismiss the indictment because of a matter that occurred before the grand jury.'" ECF No. 191 at 22 (citing Rule 6(e)(3)(E)(ii)). In other words, he correctly recognized that a court may use its supervisory authority to determine that the "cumulative effect of . . . many instances of misconduct" warrants dismissal of an indictment. *Breslin*, 916 F. Supp. at 446; *Rice*, 90 F. App'x at 926.

In sum, Judge Fitzpatrick conducted a thorough review of the record and determined—pursuant to binding precedent—that the government may have committed misconduct that prejudiced the defendant. Accordingly, there is no basis for this Court to determine that Judge Fitzpatrick's order was clearly erroneous or contrary to law.

II. THE GOVERNMENT IDENTIFIES NO BASIS TO SET ASIDE JUDGE FITZPATRICK'S ORDER

The government raises objections to Judge Fitzpatrick's findings regarding its potential violations of the Fourth Amendment, its potential violations of the attorney-client privilege, and Ms. Halligan's potential misstatements of law. Several flaws pervade them all. Most importantly, the government fails entirely to address Judge Fitzpatrick's finding that the government's acts of potential misconduct *collectively* justify disclosure of the grand jury materials. Instead, the government addresses each act in isolation, explaining why it does not justify disclosure on its own. But as discussed, courts have the authority to order disclosure based on the cumulative effects of acts that might not independently warrant disclosure. *See supra* at 4. The government's failure to engage with that principle alone defeats the government's objections. Additionally, at various points, the government argues that Judge Fitzpatrick's order must be set aside because he failed to explain why the current record justifies dismissal. Those arguments misconstrue the legal standard—all Judge Fitzpatrick had to do was find that there is evidence of potential misconduct that *may* justify dismissal. *See* Fed. R. Crim. P. 6(e)(3)(E)(ii).

In any event, each of the government's objections lacks merit on its own terms. And the government's baseless accusation that Judge Fitzpatrick somehow violated judicial ethics by issuing a decision the government does not like is both unseemly and improper.

A. The Government's Fourth Amendment Arguments Lack Merit

The government does not dispute that its retention of Mr. Richman's materials potentially violated the Fourth Amendment. Nor does it dispute that its use of those communications "substantially influenced the grand jury's decision to indict." *Bank of Nova Scotia*, 487 U.S. at 256.

Instead, the government's primary argument (ECF No. 200 at 10-12) is that a "violation of the Fourth Amendment is not a basis for dismissal of an indictment." That argument, however, relies exclusively on cases in which courts have held that the exclusionary rule does not apply to grand jury proceedings. Accordingly, while those cases may be relevant to any potential suppression motions, they have little—if any—bearing on whether a flagrant violation of the Fourth Amendment before the grand jury can ever justify dismissal of an indictment. On the contrary, the Supreme Court has suggested that any constitutional or statutory violation rising to the level of "prosecutorial misconduct" may justify dismissal when it has a "substantial influence" on the grand jury's decision to indict. *Bank of Nova Scotia*, 487 U.S. at 254-57.

The government lacks support for its proposed categorical rule. Indeed, lower courts have held that a constitutional violation that may not normally require dismissal of an indictment—such as a *Brady* violation—may justify dismissal when the government "willfully" or "recklessly" commits such a violation in the course of obtaining an indictment. *United States v. Bundy*, 968 F.3d 1019, 1031, 1039, 1045 (9th Cir. 2020) (affirming dismissal of indictment based on several willful *Brady* violations); *see id.* at 1038 ("'[R]eckless disregard for the prosecution's constitutional obligations' is sufficient to give rise to flagrant misconduct." (citation omitted)).[1] The government provides no principled reason why the same rule would not apply to Fourth Amendment violations. And as Judge Fitzpatrick found, "the nature and circumstances surrounding the government's potential violations of the Fourth Amendment and court orders establish a reasonable basis to question whether the government's conduct was willful or in reckless disregard of the law." ECF No. 191 at 21. Nothing more is required to justify disclosure of the grand jury materials.

The government also errs in arguing (ECF No. 200 at 12-14) that Mr. Comey would lack standing to challenge the government's use of his communications with Mr. Richman. Based on unpublished district court opinions from other Circuits, the government contends "that a third party—like the defendant—cannot vicariously challenge the propriety of the Government's execution of a search warrant on an email (or other online) account belonging to another." *Id.* at 13 (citing *United States v. Johnson*, No. 17-cr-10129, 2019 WL 917175, at *6-7 (D. Mass. Feb. 25, 2019); *United States v. Bazar*, No. 15-cr-499, 2015 WL 6396011, at *1 (S.D. Ca. Oct. 21, 2025)). But the Fourth Circuit has made clear that a defendant has Fourth Amendment "standing" to "seek[] to exclude the evidence obtained during" a search or seizure that "violated the[ir] Fourth Amendment rights," including when they had a "reasonable expectation of privacy" in "property that is held by another." *United States v. Castellanos*, 716 F.3d 828, 832 n.3, 833-34 (4th Cir. 2013).

Although it is unnecessary for this Court to resolve Mr. Comey's standing at this stage—again, disclosure is warranted if the government's misconduct *may* justify dismissal—Mr. Comey had a reasonable expectation of privacy in the attorney-client communications stored on Mr. Richman's materials. An individual has a Fourth Amendment reasonable expectation of privacy if he has both a "genuine subjective expectation of privacy in his records" and there is an objective "societal understanding" that the expectation of privacy is "legitimate." *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000). Mr. Comey plainly had an expectation of privacy in his communications with his lawyer, which was clear from the face of the communications the government agents reviewed and printed in September 2025, ECF No. 172-2 at 2,[2] as set forth in the *ex parte* submission the defense submitted to Judge Fitzpatrick. Moreover, the government was aware of this privileged relationship and the date it began, as set forth in the warrants at issue. *See* ECF No. 191 at 7. In turn, courts have recognized the societal "understanding" that "an attorney's clients have a legitimate expectation of privacy in their client files," based on protections under "federal and state statutes, in codes of professional responsibility, under common law, and in the United States Constitution." *DeMassa v. Nunez*, 770 F.2d 1505, 1506-08 (9th Cir. 1985) (citing *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)). Thus, at the very least, the record and the law support Judge Fitzpatrick's conclusion that there is a "reasonable basis" for Mr. Comey to raise a Fourth Amendment challenge. ECF No. 191 at 20-21.

Finally, the government's conclusory assertion that Fourth Amendment violations "are no basis for ordering disclosure, because they were not 'a matter that occurred before the grand jury,'" ECF No. 200 at 10 (citing Fed. R. Crim. P. 6(e)(3)(E)(ii)), defies logic. Under that theory, misconduct involving the presentation of evidence could *never* serve as the basis for dismissing an indictment, as evidence is always collected and prepared outside the grand jury room. For instance, under the government's theory, it could completely fabricate evidence and present it to the grand jury with no consequence. No case or other authority requires that absurd result.

B. The Government's Arguments Regarding Attorney-Client Privilege Lack Merit

The government's arguments regarding its potential violations of the attorney-client privilege largely mirror its flawed Fourth Amendment arguments. To start, the government asserts (ECF No. 200 at 15-16) that the use of privileged information at a grand jury proceeding can never justify dismissal of the indictment. For support, the government simply points to Judge Fitzpatrick's statement "that 'the grand jury's consideration of evidence obtained in violation of the attorney-client privilege, *on its own*, does not constitute grounds for dismissal of an indictment.'" *Id.* at 15 (citing ECF No. 191 at 18 (citation omitted)) (emphasis added).

But that assertion ignores relevant case law and Judge Fitzpatrick's particularized factual findings. As discussed, the "willful" or "reckless" violation of a fundamental right can justify the dismissal of an indictment, even if a violation of that right would not typically justify dismissal. *See Bundy*, 968 F.3d at 1045. There is no question that the attorney-client privilege is such a right—when it applies, "it affords confidential communications between lawyer and client complete protection from disclosure." *In re Grand Jury Subpoena*, 341 F.3d at 335; *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."). Here, Judge Fitzpatrick found that "the nature and circumstances surrounding the disclosure of potentially privileged information establish a reasonable basis to question whether the government's conduct was willful or in reckless disregard of the law." ECF No. 191 at 21-22. Judge Fitzpatrick found it particularly significant that Agent-3—the sole witness to appear before the grand jury—was advised by the FBI's Office of General Counsel that he had been exposed to Mr. Comey's privileged information and nevertheless testified. *Id.* at 13, 22. The government provides no reason to disturb that finding or Judge Fitzpatrick's resulting conclusion that—in combination with the government's other misconduct—its willful violation of the attorney-client privilege may serve as a basis for dismissing the indictment.[3]

Contrary to the government's suggestion (ECF No. 200 at 16-17), Judge Fitzpatrick had ample basis to find that Mr. Richman and Mr. Comey had an attorney-client relationship. Again, the government's own evidence establishes that such a relationship existed. *See* ECF No. 172-2 at 2. The record also contains the government's affidavits to the Arctic Haze warrant applications, each of which state: "on or about May 9-10, 2017, RICHMAN was retained by Comey as his personal lawyer." ECF No. 71 at 3-4, *id.* Ex. A at -5726; *id.* Ex. B at -26439; *id.* Ex. C at -26325; *id.* Ex. D at -26388. Both parties have also cited the Department of Justice Office of Inspector General (OIG) Report which states, many times (*e.g.*, at 2 and 13), that Mr. Richman "was one of Comey's attorneys." *See* ECF No. 54 at 2 n.2, (government citing the report, which it later introduced into evidence at ECF No. 138-11.); ECF No. 138 at 9 n.7 (noting that "The defendant 'told the OIG that the day after his removal, or very shortly thereafter, he retained attorneys Patrick Fitzgerald, David Kelley, and Daniel Richman to provide advice and counsel in connection with [his] termination as FBI Director and any post-termination legal issues that might arise.'").

Even if the government has its own view of the contours of Mr. Comey's privileged relationship with Mr. Richman, that does not give the government license to rummage through privileged materials unchecked with no involvement of the privilege-holder, Mr. Comey. ECF No. 200 at 17-18. Judge Fitzpatrick correctly held that Mr. Comey, as the privilege holder, is the only one who may waive that privilege, and the government's decision not to involve him in the prior review or in its warrantless search of Mr. Richman's materials in September 2025 supports a "reasonable basis to question whether the government's" conduct with respect to privilege was "reckless." ECF No. 191 at 8, 12, 21-22.

Accordingly, there is no basis for this Court to conclude that Judge Fitzpatrick's findings regarding the government's potential violation of the attorney-client privilege were clearly erroneous or contrary to law.[4] And as discussed, the government does not even attempt to address Judge Fitzpatrick's findings regarding the cumulative effect of these potential violations and the government's other misconduct.

C. The Government's Arguments Regarding Ms. Halligan's Misstatements of Law Underscore Why Disclosure of the Grand Jury Materials Is Necessary

The government barely disputes that if Judge Fitzpatrick's characterization of Ms. Halligan's statements is correct, then those statements could justify dismissal. Although it asserts (ECF No. 200 at 19) that "they would still fall far short of the demanding standard required for disclosure under Rule 6(e)," it makes no attempt to explain why that is so.

That is for good reason. As quoted in the sealed version of Judge Fitzpatrick's order, Ms. Halligan stated to the grand jury: [redacted] ECF No. 192 at 15. Judge Fitzpatrick observed that Ms. Halligan provided this statement in response to "challenging questions from grand jurors" and that it suggested Mr. Comey does not have a Fifth Amendment right to refrain from testifying. *Id.* at 15-16. Not only would that have been a fundamental misstatement of law, *see Griffin*, 380 U.S. at 615, it would have significantly prejudiced Mr. Comey by allowing the grand jury to think the government could shift the burden to Mr. Comey to prove his innocence, thereby resolving doubts grand jurors had about the government's case, ECF No. 192 at 15-16.

Ms. Halligan's statement also embodied another fundamental misconception about the government's burden: The jury's role is never to determine innocence—the only question is not guilty or guilty, and the government must carry its burden of proof. Accordingly, her use of the phrase [redacted] further conveyed a skewed sense of the issues at stake in this case and deepened the misconceptions she gave the grand jury about the respective burdens of the government and Mr. Comey. *See United States v. Mendoza-Acevedo*, 950 F.2d 1, 4 (1st Cir. 1991) ("[W]ithin our criminal justice system, we think the difference between 'not guilty' and 'innocent' is more than semantics." (citation omitted)).

Judge Fitzpatrick also found that Ms. Halligan suggested that the grand jurors could find probable cause based on the government's representations that it would produce "more evidence," and potentially "better evidence," in the future. ECF No. 191 at 16. Not only would that have been a fundamental misstatement of law, *see* Handbook for Grand Jurors Serving in the United States District Courts, U.S. District Court for the Eastern District of Virginia, at 7; *Cooper*, 247 F. at 47 (4th Cir. 1917), it would have significantly prejudiced Mr. Comey by allowing skeptical grand jurors to think the government's case was stronger than it appeared at the time.

In a close case like this one, any one of these erroneous instructions could have tipped the balance away from no true bill. Collectively, they raise at least "'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Bank of Nova Scotia*, 487 U.S. at 256.

The government's sole argument is that the full context of those statements, as displayed in the grand jury proceeding transcript, shows that Judge Fitzpatrick's characterization is wrong. *See* ECF No. 18-22. But unsurprisingly, it has not provided the defense with the opportunity to review the text it cites in support. Accordingly, it is impossible for the defense to tell whether the government's argument is correct. Of course, Judge Fitzpatrick *did* have the full text in reaching his conclusion.

In fact, the government's argument only highlights why disclosure is critically necessary. As explained in Mr. Comey's Motion for Disclosure of Grand Jury Proceedings, the facially ambiguous indictment and the aberrant procedures leading to the indictment create a risk that Ms. Halligan may have misstated key issues of law to the grand jury. *See* ECF No. 208 at 2-4. Judge Fitzpatrick's findings increase that risk significantly. Given that increased risk, the status quo is untenable—the government cannot be allowed to take the position that context is key to understanding whether Mr. Comey's rights have been violated while preventing Mr. Comey from seeing that context. The only way for Mr. Comey to obtain clarity and determine whether Ms. Halligan did in fact secure the indictment through misrepresentations of fundamental legal principles is to review the transcript.

At bottom, the government's arguments fail to address how there was not "'grave doubt that the decision to indict was free from the substantial influence'" of the government's misstatements of fundamental principles of criminal law, *Stevens*, 771 F. Supp. 2d at 5667 (citing *Peralta*, 763 F. Supp. at 21)—especially in the face of a grand jury that deliberated for over two hours, failed to find probable cause as to one of the government's proposed counts, and only reached a razor-thin margin of 14 votes as to two others. Judge Fitzpatrick's conclusion that Ms. Halligan's errors in front of the grand jury reasonably formed a basis for the defense to challenge "whether the grand jury proceedings were infected with constitutional error" was sound. ECF 191 at 22.

D. The Government's Statements Regarding Judge Fitzpatrick's Ethical Obligations Are Outrageous

The government's suggestion that Judge Fitzpatrick's order is inconsistent with his ethical obligations is the proverbial thirteenth stroke of the clock—suspicious in itself and casting doubt on all that went before. First, it suggests (ECF No. 200 at 18-19) that his order is inconsistent with "Canon 2(A) of the Code of Conduct for United States Judges," which "requires every judge to 'act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary' and to avoid orders that 'misstate or distort the record.'" Second, it suggests (ECF No. 200 at 19) that his order is inconsistent with "Canon 3(A)(4)," which "requires courts to ensure that factual determinations are based on the actual record, not assumptions or misrepresentations."

Those suggestions are baseless.[5] To be sure, a party may argue that a judge is biased or prejudiced. *See* 28 U.S.C. § 455. But even "judicial remarks that are 'critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.'" *Belue v. Leventhal*, 640 F.3d 567, 573 (4th Cir. 2011) (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)). The government cannot seriously argue that Judge Fitzpatrick's conduct comes close to meeting that level. Instead, the government's sole basis for citing the Judicial Code of Conduct is its apparent disagreement with Judge Fitzpatrick's interpretation of the grand jury proceeding transcript. *See* ECF No. 200 at 18-19. And based on that disagreement, it asks this Court to defer to its own interpretation. *Id.* at 19 ("Measured against these obligations and the rule of law, the magistrate's reading of the transcript cannot stand."). Of course, it cites no authority to support that outlandish position.

The Judicial Code of Conduct plainly has no bearing on this appeal, and to suggest otherwise is conduct unbecoming of the government. Judge Fitzpatrick issued a carefully reasoned, factually grounded opinion that "particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment." *Loc Tien Nguyen*, 314 F. Supp. 2d at 616. Based on those findings, this Court should deny the government's opposition.

CONCLUSION

For the foregoing reasons, the government's opposition should be denied.

Dated: November 21, 2025

Respectfully submitted,

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of November, 2025, a true copy of the foregoing document was filed electronically through the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

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[1] As set forth in Mr. Comey's Reply Memorandum in Support of Motion for Disclosure of Grand Jury Proceedings, there is substantial reason to believe that such a *Brady* violation occurred here. *See* ECF No. 208 at 6-7.

[2] For that reason, the government's assertion (ECF No. 200 at 13 n.15) that "sworn evidence, in the form of affidavit or testimony" is required to establish Fourth Amendment standing is perplexing. Regardless, Mr. Comey is under no obligation to establish standing at this stage.

[3] The government's sole statement addressing that finding is a conclusory assertion that it "does not concede that" Agent-3 is "subject to disqualification." ECF No. 200 at 16 n.18.

[4] As with its Fourth Amendment arguments, the government argues that a violation of the attorney-client privilege cannot serve as a basis to disclose grand jury proceedings "because any errors concerning the filter protocol were not 'a matter that occurred before the grand jury.'" Fed. R. Crim. P. 6(e)(3)(E)(ii). ECF No. 200 at 14. That argument fails for the reasons described above. *See supra* at 12.

[5] Given the shifting factual assertions by the government to Judge Vaala, Judge Currie, Judge Fitzpatrick and this Court as to how the putative indictment was returned—including how many votes were taken by the grand jury—it is ironic that the government is questioning the integrity of judicial officers attempting to navigate its various accounts.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

United States of America,)
)
v.) Case No.: 1:25-CR-00272-MSN
)
James B. Comey, Jr.,)
)
Defendant.)

JAMES B. COMEY, JR.'S MOTION TO DISMISS INDICTMENT BASED ON FIFTH AMENDMENT, RULE 6, AND GRAND JURY VIOLATIONS

James B. Comey, Jr., by and through undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 12(b), moves this Court to dismiss the government's indictment. As explained in the accompanying Memorandum, the case should be dismissed because the grand jury never approved the operative indictment. "A grand jury may indict only if at least 12 jurors concur." Fed. R. Crim. P. 6(f). But here, at least 12 jurors did not concur in the operative two-count indictment; and the grand jury rejected the only indictment that the government presented to it. The government's attempt to prosecute Mr. Comey without a valid "indictment of a Grand Jury" violates the Fifth Amendment. U.S. Const. Amend. V. Moreover, dismissal is independently warranted because of the government's misconduct before the grand jury. Among other things, the government relied on information it obtained in violation of the Fourth Amendment and the attorney-client privilege; and it made serious misstatements of law to the grand jury. Collectively, those violations raise "'grave doubt that the decision to indict was free from the substantial influence of" the government's misconduct, warranting dismissal with prejudice. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (citation omitted).

INTRODUCTION

In previous filings, Defendant James B. Comey, Jr., has identified multiple independent reasons why this case is legally flawed and must be dismissed with prejudice. This Motion focuses on fundamental errors in the grand jury process itself. Those errors reflect the reckless and ill-conceived nature of this prosecution: A president intent on prosecuting Mr. Comey before the statute of limitations expired directed the appointment of a White House aide, Lindsey Halligan, as interim U.S. Attorney, and she then rushed to secure an indictment while flagrantly violating basic grand jury rules in the process. Those grand jury errors warrant dismissal twice over.

First, the case should be dismissed because the grand jury never approved the operative indictment. "A grand jury may indict only if at least 12 jurors concur." Fed. R. Crim. P. 6(f). Here, the grand jury voted to *reject* the only indictment that the government presented to it. Instead of presenting the grand jury with a revised indictment, Ms. Halligan signed a new two-count indictment that the grand jury had never seen or voted on. Because at least 12 jurors did not "approve the actual indictment," there is no valid indictment of Mr. Comey. *Gaither v. United States*, 413 F.2d 1061, 1072 (D.C. Cir. 1969). The government's attempt to prosecute Mr. Comey without a valid "indictment of a Grand Jury" violates Mr. Comey's Fifth Amendment rights. U.S. Const. Amend. V. And because no indictment has been "found . . . within five years" of Mr. Comey's alleged offenses, the statute of limitations on those offenses has expired. 18 U.S.C. § 3282(a).

The government's late-breaking "Notice Correcting the Record" cannot save the putative indictment. ECF No. 206. That filing contradicts numerous other representations that the government has made to this Court. And it rests on an erroneous overreading of an ambiguous exchange between the grand jury foreperson and the magistrate judge. Even if the grand jury was in fact presented with the operative indictment, that would only raise a host of additional problems for the government—not least of which is the apparent absence of any recording of that presentment.

Second, dismissal is independently warranted because of the government's misconduct before the grand jury. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-56 (1988). Mr. Comey has extensively documented that misconduct in prior filings. *See* ECF Nos. 106, 208, 210. And Judge Fitzpatrick's recent opinion details "a disturbing pattern of profound investigative" and prosecutorial "missteps" that have undermined "the integrity of the grand jury proceeding" in this case. ECF No. 191 at 24. Among other things, the government executed search warrants in a manner that violated the Fourth Amendment and relied on the information obtained from those searches as part of its grand jury presentation; relied on attorney-client privileged information as part of its grand jury presentation; and made serious misstatements of law to the grand jurors. *See id.* at 20-22. Collectively, those violations raise "'grave doubt' that the decision to indict"—which the grand jury reached only by a narrow margin and after lengthy deliberations—"was free from the substantial influence of" the government's misconduct. *Bank of Nova Scotia*, 287 U.S. at 256. The putative indictment should therefore be dismissed. And that dismissal should be with prejudice because of the flagrant nature of the government's misconduct during the grand jury process—particularly combined with the flagrantly unconstitutional initiation of this prosecution at the President's behest.[1]

BACKGROUND

At the President's direction, the Attorney General purported to appoint Ms. Halligan as interim United States Attorney for the Eastern District of Virginia under 28 U.S.C. § 546. ECF No. 59-1. Before that purported appointment, Ms. Halligan had never worked as a prosecutor. Yet three days after the purported appointment—and just days before the statute of limitations expired on Mr. Comey's alleged offenses—she presented an indictment to a grand jury seeking to charge Mr. Comey with multiple crimes.

A. The Grand Jury Proceedings

1. The presentment proceedings

On September 25, Ms. Halligan sought a grand jury indictment of Mr. Comey. According to Ms. Halligan, the grand jury proceeding began at about 2:18 PM. ECF No. 188-1 at 2. No other prosecutor participated at any stage of the proceedings. ECF No. 191 at 14. Thus, besides Ms. Halligan, the only individuals who participated in or witnessed the presentation of the indictment were the grand jurors, the court reporter, and an FBI agent (Agent-3) who appeared as a witness. The grand jury coordinator (a U.S. Attorney's Office employee) and court security officer (CSO) were stationed outside the grand jury room.

The record establishes that Ms. Halligan presented the grand jury with an indictment that included three counts:

- Count One alleged that "[o]n or about September 30, 2020," Mr. Comey violated 18 U.S.C. § 1001(a)(2) by "falsely stating" to Senators Lindsey Graham and Josh Hawley "during a Senate Judiciary Committee hearing that he, JAMES B. COMEY, JR., did not remember 'being taught' of" Hillary Clinton's "'approval of a plan concerning'" Donald Trump "and the 2016 U.S. Presidential election."
- Count Two alleged that "[o]n or about September 30, 2020," Mr. Comey violated 18 U.S.C. § 1001(a)(2) by "falsely stating" to Senator Ted Cruz "during a Senate Judiciary Committee hearing that he, JAMES B. COMEY, JR., had not 'authorized someone else at the FBI to be an anonymous source in news reports' regarding an FBI investigation concerning" Hillary Clinton.
- Count Three alleged that "[o]n or about September 30, 2020," Mr. Comey violated 18 U.S.C. § 1505 "by making false and misleading statements before" the "Senate Judiciary Committee."

ECF No. 3; *see* ECF No. 191 at 16. The government has produced the transcript and audio recording of the presentment to the Court in connection with motion practice. ECF No. 179. But the defense has not yet viewed the grand jury materials. *See* ECF No. 208. Nonetheless, the proceedings before Judge Fitzpatrick and the government's representations to the defense and this Court establish four important facts about the presentment.

First, in attempting to establish probable cause for Count Three, Ms. Halligan relied exclusively on the alleged false statements that served as the bases for Counts One and Two. The government first informed the defense of that fact in a meet and confer on November 12. See ECF No. 204 at 8. It then identified only these two statements as examples of allegedly false testimony in its opposition to Mr. Comey's Motion for Bill of Particulars. ECF No. 183 at 14.

Second, as Judge Fitzpatrick found, Ms. Halligan "suggest[ed] to the grand jury that Mr. Comey does not have a Fifth Amendment right not to testify at trial." ECF No. 192 at 15. Specifically, in explaining to the grand jury how the government intended to prove its case, she stated: [redacted] *Id.*

Third, as Judge Fitzpatrick found, Ms. Halligan "suggested to the grand jury that they did not have to rely only on the record before them to determine probable cause but could be assured the government had more evidence–perhaps better evidence–that would be presented at trial." *Id.* at 16. Again explaining to the grand jury how the government intended to prove its case, she stated: [redacted] *Id.*

Fourth, as Judge Fitzpatrick found, materials retained and searched in violation of the Fourth Amendment (which may have included privileged communications between Mr. Comey and his attorney Daniel Richman) formed the "cornerstone of the government's grand jury presentation." *Id.* at 14. The government had originally obtained those materials pursuant to a 2019 warrant that authorized the government—as part of the Arctic Haze investigation—to search for materials related to potential violations of 18 U.S.C. § 641 and 18 U.S.C. § 793. *Id.* at 9. Although the Arctic Haze investigation had concluded in 2021, the government retained those materials and searched them in September 2025 without seeking a new warrant. *Id.* at 10-11. Agents reviewed and printed privileged communications between Mr. Comey and his lawyer and provided what the government has characterized as a "limited overview" to Agent-3. ECF No. 172-2. In turn, Ms. Halligan extensively questioned Agent-3 about communications between Mr. Comey and Mr. Richman during Agent-3's testimony before the grand jury. ECF No. 192 at 14.

2. The post-presentment proceedings

The grand jury apparently deliberated for more than two hours. *See* ECF No. 188-1 at 2. At the end of the deliberation, the grand jury returned a "no true bill" indicating its "failure to concur in an indictment." ECF No. 3 at 1. The foreperson's report stated the following:

> As the foreperson of the grand jury of this court at a session held at Alexandria, Virginia on Sep 25, 2025, I report that 12 or more grand jurors did not concur in finding an indictment in this case.

Id. The foreperson signed and dated that report, which was appended as a cover page to the three-count indictment that the grand jury had rejected. *Id.*

Although the defense lacks complete information about the exact order of subsequent events, the government's representations at the November 19 hearing, ECF No. 207, Ms. Halligan's November 14 declaration (ECF No. 188-1), the government's filings, and the transcript of the grand jury return proceeding before Judge Vaala (ECF No. 10) suggest that the following events occurred.

After the close of deliberations, the grand jury foreperson informed the U.S. Attorney's Office grand jury coordinator that the grand jury had voted to reject Count One but had voted to approve Counts Two and Three. ECF No. 200 at 23 n.23. The grand jury coordinator then informed someone from the U.S. Attorney's Office about that result. *Id.* According to Ms. Halligan, then-First Assistant U.S. Attorney Maggie Cleary informed her of the grand jury coordinator's account at about 6:40 PM. ECF No. 188-1 at 2. Ms. Halligan "proceeded to the courtroom for the return of the indictment in front of the magistrate judge." *Id.*

At some point before appearing in front of Judge Vaala, Ms. Halligan and the foreperson signed the last page of the "Report of a Grand Jury's Failure to Concur in an Indictment," ECF No. 3 at 4, and someone from the U.S. Attorney's Office printed a new indictment that included only two counts, ECF No. 1. Count One of the putative new indictment corresponded to Count Two of the original indictment; Count Two of the putative new indictment corresponded to Count Three of the original indictment. *Id.* at 1-2. Ms. Halligan and the foreperson signed the new indictment. *Id.* at 2. But there is no record of the grand jury seeing the new indictment—let alone voting on it.

Ms. Halligan and the foreperson then appeared before Judge Vaala at 6:47 PM. ECF No. 10 at 1. They presented Judge Vaala with both the "no true bill" and the new two-count indictment. After the foreperson stated that the grand jury had failed to find probable cause as to Count One, Judge Vaala asked the foreperson several questions:

> THE COURT: Okay. When you say one count -- so I'm looking at two different - - I'm looking at case 25-cr-272, *United States of America v. James B. Comey, Jr.* I have an indictment with two counts that my courtroom deputy read that looks to be signed by you, ma'am.
>
> THE FOREPERSON: Yes.
>
> THE COURT: And it says 14 grand jurors concurred in the indictment. And then I have a report of a grand jury's failure to concur in an indictment, and it just reports that -- has three counts, and it says that the grand jurors did not concur in finding an indictment in this case.
>
> THE FOREPERSON: So the three counts should be just one count. It was the very first count that we did not agree on, and the Count Two and Three were then put in a different package, which we agreed on.
>
> THE COURT: So you --
>
> THE FOREPERSON: So they separated it.
>
> THE COURT: Sorry, I didn't mean to interrupt you. So you voted on the one that has the two counts?
>
> THE FOREPERSON: Yes.

Id. at 3-4.

> Judge Vaala then asked Ms. Halligan for an explanation of what happened:
>
> THE COURT: So this has never happened before. I've been handed two documents that are in the Mr. Comey case that are inconsistent with one another. There seems to be a discrepancy. They're both signed by the foreperson. The one that says it's a failure to concur in an indictment, it doesn't say with respect to one count. It looks like they failed to concur across all three counts, so I'm a little confused as to why I was handed two things with the same case number that are inconsistent.
>
> MS. HALLIGAN: So I only reviewed the one with the two counts that our office redrafted when we found out about the two -- two counts that were true billed, and I signed that one. I did not see the other one. I don't know where that came from.
>
> THE COURT: You didn't see it?
>
> MS. HALLIGAN: I did not see that one.
>
> THE COURT: So your office didn't prepare the indictment that they --
>
> MS. HALLIGAN: No, no, no -- I -- no, I prepared three counts. I only signed the one -- the two-count. I don't know which one with three counts you have in your hands.
>
> THE COURT: Okay. It has your signature on it.
>
> MS. HALLIGAN: Okay. Well...

Id. at 5. Judge Vaala then instructed the foreperson to modify the "Report of a Grand Jury's Failure to Concur in an Indictment"—by hand—to reflect that it applied only to Count One. *Id.* at 6. The report filed on the docket reflects that modification. ECF No. 3 at 1.

B. Pre-Trial Litigation

Mr. Comey and the government have filed three motions that are relevant here: (1) Mr. Comey's Motion to Dismiss Indictment Based on Unlawful Appointment (ECF No. 60); (2) the government's Motion for Implementation of Filter Protocol (ECF No. 38); and (3) Mr. Comey's Motion to Dismiss Indictment Based on Vindictive and Selective Prosecution (ECF No. 59). Given the Court's familiarity with these motions and the relevant hearings and orders, Mr. Comey recounts only the key details here.

1. The unlawful appointment motion and hearing

On October 20, Mr. Comey moved to dismiss the indictment on the ground that it had been secured by an improperly appointed interim U.S. Attorney. ECF No. 60. That motion was transferred to Judge Currie. ECF No. 62. On October 28, Judge Currie ordered the government to submit "for in camera review, all documents relating to the indictment signer's participation in the grand jury proceedings, along with complete grand jury transcripts." ECF No. 95. The government purported to comply with Judge Currie's order on November 3.

The next day, however, Judge Currie issued an order stating that the grand jury materials she had received were incomplete:

> This court has reviewed the transcript and finds it fails to include remarks made by the indictment signer both before and after the testimony of the sole witness, which remarks were referenced by the indictment signer during the witness's testimony. In addition, the package contains no records or transcripts regarding the presentation of the three-count indictment referenced in the Transcript of the Return of Grand Jury Indictment Proceedings before the Magistrate Judge.

ECF No. 148 at 1. Accordingly, Judge Currie ordered the government to provide "a complete Transcript and/or recording of all statements made by the indictment signer to the grand jury on September 25, 2025, to include statements made prior to and after the testimony of the witness and during the presentation of the three-count and subsequent two-count indictments." *Id.* at 1-2. On November 5, the government filed a notice of compliance, explaining that it had just received the relevant audio recording and transcript that day, which it provided to Judge Currie. ECF No. 158 at 1-2.

On November 13, the parties appeared before Judge Currie for a hearing on the motion. In an exchange with the government on the effect of the Attorney General's purported October 31 ratification of Ms. Halligan's actions, ECF No. 137-1, Judge Currie observed that the purported ratification could not pertain to the entirety of Ms. Halligan's conduct before the grand jury because the complete transcript had not been prepared until after the purported ratification. Judge Currie also noted that the transcript still appeared to be incomplete because it concluded at 4:28 PM—almost two-and-a-half hours before the return proceeding in front of Judge Valaa. Judge Currie asked whether it was possible that, during the portion of the proceeding for which there was no transcript, Ms. Halligan had been alone with the grand jury or other individuals had appeared.

The day after the hearing, the government filed a declaration from Ms. Halligan that purported to explain the discrepancy by providing a "brief timeline of the events that day." ECF No. 188-1 at 2. The declaration stated that Ms. Halligan "had no interaction whatsoever with any members of the grand jury" between the close of her presentation at 4:28 PM and the start of the return proceeding at 6:40 PM. *Id.*

2. The filter protocol motion and order

After the indictment was filed, the parties engaged in conversations about limitations on the government's handling and use of privileged information. On October 13, the government filed a motion asking the Court to approve the use of a filter team to handle potentially privileged information. ECF No. 38. Mr. Comey opposed, ECF No. 71, and on October 29, this Court assigned Judge Fitzpatrick to resolve legal issues related to the government's motion, ECF No. 102.

On October 5, Judge Fitzpatrick denied the government's motion. ECF No. 161. Additionally, after Mr. Comey explained that the government had relied on potentially privileged information when presenting the indictment to the grand jury, Judge Fitzpatrick ordered the government to file under seal "all documents relating to the September 25, 2025 grand jury proceedings, including complete audio recordings and transcripts." *Id.* at 2. The government immediately appealed and, on November 7, this Court "remanded to Judge Fitzpatrick for further proceedings to analyze whether there are particularized and factually based grounds for disclosure." ECF No. 167 at 2.

On November 17, Judge Fitzpatrick issued an opinion that specified eleven particularized grounds justifying disclosure. ECF No. 191 at 21-22. Nine of those grounds related to the government's use of materials—including potentially privileged information—obtained in violation of the Fourth Amendment. *Id.* Judge Fitzpatrick also found that Ms. Halligan "made statements to the grand jurors that could reasonably form the basis for the defense to challenge whether the grand jury proceedings were infected with constitutional error." *Id.* at 22. Based on those findings, he ordered the government to immediately disclose the grand jury materials to the defense. This Court stayed that ruling pending its consideration of the government's objections to Judge Fitzpatrick's order. ECF No. 197.

3. The vindictive and selective prosecution motion and hearing

On October 20, Mr. Comey filed a motion to dismiss the indictment because this prosecution is both vindictive and selective, in violation of the Due Process Clause, the First Amendment, and equal protection principles. ECF No. 59. On November 19, the parties appeared before this Court for a hearing on the motion. ECF No. 207.

At the hearing, the government provided additional details about the grand jury proceedings. Most importantly, the government admitted that Ms. Halligan had never presented the operative two-count indictment to the grand jury. *See* ECF No. 207 at 48. The government explained that although the "Report of a Grand Jury's Failure to Concur in an Indictment," ECF No. 3, did not indicate that the grand jury had voted to find probable cause on any count of the indictment, Ms. Halligan heard—via the grand jury coordinator and Ms. Cleary—that 14 grand jurors had voted to find probable cause for Counts Two and Three. ECF No. 207 at 44. Someone (presumably at the U.S. Attorney's Office) then prepared a new two-count indictment; Ms. Halligan and the foreperson signed that indictment and took it to Judge Vaala. *Id.* at 45. But the government conceded that the new two-count indictment was never presented to, voted on, or approved by the grand jury. *Id.* at 48.

ARGUMENT

I. THE CASE MUST BE DISMISSED BECAUSE THE OPERATIVE INDICTMENT WAS NOT APPROVED BY THE GRAND JURY

To be legally valid, an indictment must be presented to the grand jury, and at least 12 grand jurors must approve of that indictment. That basic requirement was not satisfied here. The grand jury voted to reject the only indictment that was presented to it. But rather than presenting a revised indictment to the grand jury, Ms. Halligan signed a new two-count indictment that the grand jury never saw—let alone approved. Thus, the supposedly operative indictment in this case is not an "indictment of a Grand Jury" at all. U.S. Const. Amend. V.

A. The Fifth Amendment and Rule 6 Require that 12 Grand Jurors Concur in the Operative Indictment

The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. A "paper cannot be called a bill of indictment until it is found 'a true bill' by a properly constituted grand jury." *Cooper v. United States*, 247 F. 45, 47 (4th Cir. 1917). "[A]n indictment is 'found' when a grand jury indicts." *United States v. Thompson*, 287 F.3d 1244, 1250 (10th Cir. 2002). In turn, Federal Rule of Criminal Procedure 6 makes clear that "[a] grand jury may indict only if at least 12 jurors concur." Fed. R. Crim. P. 6(f); *see, e.g.*, *Chiles v. United States*, No. 20-cv-80, 2021 WL 6010347, at *3 (N.D. W. Va. Dec. 20, 2021) ("In order to return a true bill, at least twelve jurors must agree.").

The "very purpose" of these rules is to limit a person's "jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218 (1960). After all, "[t]he decision to hale a man into court is a serious one, subject to official abuse." *Gaither v. United States*, 413 F.2d 1061, 1066 (D.C. Cir. 1969). To allow such an action, "12 ordinary citizens must agree upon an indictment." *Id.*

In *Gaither*, the D.C. Circuit applied these principles to hold that an indictment was invalid where the full grand jury did not vote to approve it. There, "the grand jury voted to 'present' the defendants for grand larceny," after which "[a]n indictment was drafted by the United States Attorney's office, and was signed by the foreman of the jury under the traditional certification 'A True Bill.'" *Gaither*, 413 F.2d at 1065. But "[t]he grand jury as a body did not consider the case again" or vote on the actual indictment. *Id.* The court ruled that this procedure "was error" because Rule 6 requires "that 12 jurors approve the actual indictment." *Id.* at 1071-1072.

The D.C. Circuit grounded its holding in history and tradition. The court explained that the American criminal law has consistently required the "submission of the formal indictment to the grand jury for approval." *Id.* at 1069. The court cited two nineteenth-century decisions—including one from the District of Virginia—reflecting that practice. *Id.* at 1069-1070; *see United States v. Hill*, 26 Fed. Cas. 315 (D. Va. 1809). And the court emphasized that no precedent or history supported the government's proposed practice of "returning [an] indictment into court without its ratification by the full grand jury." *Gaither*, 413 F.2d at 1069. In short, the grand jury must "of course" "review the indictment and adopt it as its own." *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977).

B. The Grand Jury Did Not Approve the Operative Indictment Here

1. Under the foregoing principles, this prosecution is unlawful because it does not rest on the "indictment of a Grand Jury." U.S. Const. amend. V. "A grand jury may indict only if at least 12 jurors concur." Fed. R. Crim. P. 6(f). But here, at least 12 jurors did not concur in the only indictment presented to the grand jury. To the contrary, as to that indictment, the grand jury returned a "no true bill," as evidenced by the signed "Report of a Grand Jury's Failure to Concur in an Indictment," ECF No. 3 at 1.

During the indictment return proceeding, however, the foreperson stated that while fewer than 12 grand jurors had concurred in Count One, 14 grand jurors had concurred in Counts Two and Three. *See* ECF No. 10 at 3-4. That account is inconsistent with the original terms of the "Report of a Grand Jury's Failure to Concur in an Indictment"—which did not state that the grand jury concurred as to Counts Two and Three. ECF No. 3 at 1. But assuming the foreperson's account was accurate, the government would have needed to draft a new two-count indictment (with Count One deleted) and submit that "formal indictment to the grand jury for approval after the prosecutor had drafted it." *Gaither*, 413 F.2d at 1069.

The government has now offered conflicting accounts, but the best reading of the record is that the government never presented a new two-count indictment to the grand jury for a vote. Ms. Halligan's declaration explains that "between concluding [her] presentation and being notified of the grand jury's return, [she] had no interaction whatsoever with any members of the grand jury." ECF No. 188-1 at 2. The declaration further states that the "transcript"—which apparently contains no documentation of a second presentment—"reflects the entirety of the government's presentation and presence in front of the grand jury," and that "[t]here was no additional presentation, interaction, or discussion with the grand jury outside of what is reflected in the transcript." *Id.* at 1-2.

Other statements by the government confirm Ms. Halligan's indication that the two-count indictment was never presented to the grand jury. In its objection to Judge Fitzpatrick's order, the government explained that after the grand jury's vote, "[t]he grand jury coordinator . . . returned to the grand jury room and presented the corrected indictment to *the grand jury foreperson and the deputy foreperson*," ECF No. 200 at 23 n.23 (emphasis added)—not to the full grand jury. Likewise, the government's notice following the November 19 hearing stated that "the grand jury was provided the *proposed* Indictment"—not the new two-count indictment—and "determined that probable cause existed to believe that the defendant had committed the crimes charged in two counts." ECF No. 201 at 1 (emphasis added).

Nonetheless, at the indictment return proceeding, Ms. Halligan never stated to the magistrate judge that the grand jury failed to vote on the second, operative indictment. Ms. Halligan also incorrectly asserted to Judge Vaala that she "did not see" the three-count indictment that was attached to the "Report of a Grand Jury's Failure to Concur in an Indictment." ECF No. 10 at 5. In fact, as Judge Vaala noted, that inoperative indictment "ha[d] [Halligan's] signature on it." *Id.* Likely assuming that the grand jury had properly voted on the two-count indictment, Judge Vaala directed the foreperson to amend the "Report of a Grand Jury's Failure to Concur in an Indictment" to state that "12 or more grand jurors did not concur in finding an indictment in [*Count 1 only*] in this case." ECF 3 at 1; *see* ECF No. 10 at 6. And the foreperson and Ms. Halligan signed both the three-count indictment attached to the "Report of a Grand Jury's Failure to Concur in an Indictment," ECF 3 at 4, as well as a new two-count indictment, ECF No. 1. But again, it appears that the full grand jury had neither been presented with nor voted on the new two-count indictment. That new two-count indictment is the supposedly operative indictment in this case, ECF 1—and yet "12 jurors" did *not* "concur" in it, Fed. R. Crim. P. 6(f). Because Rule 6 requires that "12 jurors approve the actual indictment," the indictment is invalid. *Gaither*, 413 F.2d at 1072.

On November 20, the government filed a notice "to correct the record regarding statements during the hearing held on November 19, 2025." ECF No. 206 at 1. Contrary to the government's prior statements, it now claims that "the grand jury voted on—and true-billed—the two count indictment." *Id.* But its only support for that claim is the transcript of the foreperson's exchange with Judge Vaala during the return proceeding—specifically, the foreperson's response of "[y]es" to the judge's question of whether the grand jury "voted on the one that has the two counts." ECF No. 206-1 at 4. That response was ambiguous: It could have meant that the grand jury voted to approve a new two-count indictment, or it could have meant that the grand jury voted to approve Counts Two and Three of the original indictment. Thus, the government incorrectly asserts that there is no "ambiguity" or "doubt" about the foreperson's response. ECF No. 206 at 3. Indeed, if the exchange were as clear as the government now maintains, then the government presumably would have invoked it in prior filings and representations to the Court. Instead, it repeatedly indicated that the grand jury did *not* vote on the two-count indictment. *See supra* at 10-11.

If anything, the government's recent Notice to Correct the Record simply raises a host of additional potential problems with these proceedings. To the extent a government attorney presented the new two-count indictment to the grand jury, that presentment was apparently not recorded—which violates Rule 6(e)(1)'s requirement that "all proceedings . . . be recorded by a court reporter or by a suitable recording device." Fed. R. Crim. P. 6(e)(1).[2] To the extent someone else presented the new two-count indictment to the grand jury, it is unclear who that would be and what instructions they would have given—which is why only "attorney[s] authorized by law to conduct proceedings under these rules as a prosecutor" may present to the grand jury. Fed. R. Crim. P. 1(b)(1)(D). And to the extent a new two-count indictment was simply handed to the foreperson, then the absence of an experienced legal advisor could have led the foreperson to misunderstand that the grand jury must vote again on the new indictment—and would have left the grand jury without any legal instructions at all.

The government also notes that "[t]he Grand Jury foreperson . . . endorsed the revised two count Indictment by signing it" and asserting that it "reflected the vote of the Grand Jury." ECF 201 at 5. But as the D.C. Circuit explained, "the signature of the foreman cannot in itself convert the indictment, admittedly not seen by the full grand jury, into one properly found by 12 jurors as required by Rule 6." *Gaither*, 413 F.2d at 1071. That makes sense: a signature of one member of the grand jury is neither a substitute for the constitutionally required "indictment of a Grand Jury" as a body, U.S. Const. Amend. V, nor for the "concur[rence]" of "12 jurors," Fed. R. Crim. P. 6(f). Likewise, the foreperson's statement that 14 grand jurors approved two counts in the initial indictment, *see* ECF No. 10 at 4, is "not a final resolution of anything," *Blueford v. Arkansas*, 566 U.S. 599, 606 (2012). "When the foreperson told the court how the jury voted on each [count], the jury's deliberations had not yet concluded" because the jurors had not in fact deliberated on the operative indictment. *Id.* (applying same principle in the jury-trial context).

The government correctly observes that the precise "procedure described in *Gaither*" differs from "the grand jury presentation in this case." ECF 201 at 2. But the two procedures share a common flaw: under both, the operative indictment was "not seen by the full grand jury" and thus not "properly found by 12 jurors as required by Rule 6." *Gaither*, 413 F.2d at 1071. Whether that defect occurs through a vote only to "present" the defendant for a crime (as in *Gaither*), or through a vote only on a "proposed" inoperative indictment (as here), ECF 201 at 1, the fundamental problem is the same.

The government cites no authority upholding an indictment in the circumstances here. In *United States v. Bush*, 659 F.2d 163 (D.C. Cir. 1981), the court held that an indictment was valid when it was approved by at least 12 jurors but then "amended merely to correct a clerical error plainly insignificant in nature." *Id.* at 167. And the court expressly distinguished a case (like this one) where the operative indictment was "not found by twelve grand jurors" in the first place. *Id.* at 167 n.39. In *United States v. Perholtz*, 622 F. Supp. 1253 (D.D.C. 1985), the court simply held that an indictment was valid where it "was not signed by the foreman of the grand jury" but (unlike here) "was voted by more than twelve ordinary citizens after the actual terms of *the indictment* were fully presented to them." *Id.* at 1261 (emphasis added).

The government's cited cases involving "changes to indictments" support Mr. Comey. ECF 201 at 4. Those cases invoke "the settled rule" that "an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." *Russell v. United States*, 369 U.S. 749, 770 (1962). For instance, the Fourth Circuit has concluded that the government could properly "amend the indictment before trial by deleting 'base' from the reference to 'cocaine base' in the indictment." *United States v. Johnson*, 258 F. App'x 510, 511 (4th Cir. 2007). Here, the change to the indictment was a matter of substance, not "merely a matter of form." *Russell*, 369 U.S. at 770. The government deleted an entire count from the original indictment—and yet the new indictment was not "resubmi[tted] to the grand jury." *Id.*

2. The error here requires dismissal of the indictment. *Gaither* articulated "a flat rule requiring dismissal of indictments not found by 12 grand jurors" following "the date of th[e] decision" there. 413 F.2d at 1074. While *Gaither* is a D.C. Circuit decision, the government does not dispute that it is consistent with Fourth Circuit precedent. Nor could it: *Gaither* embodies the uncontroversial proposition—expressly codified in the Federal Rules—that at least 12 grand jurors must approve the operative indictment. Because *Gaither* has been on the books for nearly four decades, its "flat rule requiring dismissal" governs here. *Id.*

Even if a prejudice inquiry applied, it would be satisfied here. Accepting the foreperson's account as true, a narrow 14-vote majority of grand jurors approved Counts Two and Three in the "proposed Indictment." ECF No. 201 at 1; *see* ECF No. 10 at 3. Had the grand jury been properly required to consider a new indictment with only those two counts, there is a "reasonable possibility" that certain grand jurors would have voted differently. *Gaither*, 413 F.2d at 1075. That is particularly true because the alleged conduct underlying the proposed Count One—which the grand jury rejected—undergirds what is now Count Two. Specifically, proposed Count One involved testimony Mr. Comey gave in response to questioning from Senators Graham and Hawley; and as explained above, that same testimony forms part of the basis for the "Obstruction of a Congressional Proceeding" charge in current Count Two. ECF No. 1 at 2. Following the grand jury's express rejection of proposed Count One, it is reasonably possible that certain grand jurors would have viewed the obstruction-related charge in a different light if they had been told the basis for that charge. *See* ECF No. 208 at 7-14 (detailing the lack of support for proposed Count One).[3]

The Supreme Court's decision in *Blueford* illustrates the point. There, the foreperson announced to the judge "the jury's unanimous votes [of acquittal] on capital and first-degree murder." *Blueford*, 566 U.S. at 606. But because the jury had not resolved certain other counts, the judge "sent the jurors back to the jury room." *Id.* at 604. And after further deliberations, the jury was "unable to reach a verdict" on any count. *Id.* at 606. The Court rejected the defendant's argument that "the foreperson's announcement of the jury's unanimous votes" constituted an "acquittal," explaining that "[t]he foreperson's report was not a final resolution of anything." *Id.* The same is true here: The foreperson's assertion that the grand jury agreed on two counts in an inoperative indictment was not "the final resolution of anything," *id.*—and further deliberations could have led the grand jury in a different direction, just as they did in *Blueford*.

C. No Indictment Was "Found" Within the Five-Year Limitations Period

18 U.S.C. § 3282(a) provides that "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within five years next after such offense shall have been committed." "[A]n indictment is 'found' when a grand jury votes to indict." *Thompson*, 287 F.3d at 1251. Here, the grand jury never approved the operative indictment—so that indictment has not been "found" within the meaning of Section 3282(a). Accordingly, the five-year limitations period on Mr. Comey's alleged offenses expired on September 30, 2025. He may therefore not "be prosecuted" for those offenses. 18 U.S.C. § 3282(a).[4]

II. THE INDICTMENT SHOULD BE DISMISSED WITH PREJUDICE BASED ON MISCONDUCT BEFORE THE GRAND JURY

Mr. Comey has explained in multiple other filings why the government's serious misconduct related to the grand jury proceedings warrants disclosure of the grand jury materials. ECF Nos. 106, 208, 210. And Judge Fitzpatrick agreed that "the record points to a disturbing pattern of profound investigative" and prosecutorial "missteps" that "potentially undermine the integrity of the grand jury proceeding." ECF 191 at 24. Mr. Comey incorporates his prior filings by reference here and moves to dismiss the purported indictment based on the government's misconduct related to the grand jury proceedings.[5]

A district court may "dismiss an indictment for errors in grand jury proceedings" where "such errors prejudiced the defendant[]." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). A defendant may show prejudice if "'the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.* at 256 (citation omitted). As Mr. Comey has explained, the government's misconduct before the grand jury leaves at least grave doubt about whether the grand jury's decision was tainted by that misconduct. ECF Nos. 106, 208, 210. After all, the grand jury deliberated for more than two hours and issued a no true bill that apparently reflected fewer than 12 votes for one count and only 14 votes for the other two counts. *See United States v. Sandoval-Gonzalez*, 642 F.3d 717, 726 (9th Cir. 2011) ("Longer jury deliberations 'weigh against a finding of harmless error because lengthy deliberations suggest a difficult case.'" (citation omitted)). There is substantial basis to believe that, absent the government's misconduct, the grand jury would have rejected all three counts. Dismissal is therefore warranted under *Bank of Nova Scotia*.

That dismissal should be with prejudice. In criminal cases, a federal court may use its "supervisory powers" to "implement a remedy" aimed at vindicating "recognized rights" and "deter[ring] illegal conduct." *United States v. Hasting*, 461 U.S. 499, 505 (1983). "[T]he supervisory power can be used to dismiss an indictment because of misconduct before the grand jury." *United States v. Williams*, 504 U.S. 36, 46 (1992) (citing *Bank of Nova Scotia*, 487 U.S. 250). As the Fourth Circuit has explained, such a dismissal may be *with* prejudice. *See United States v. Goodson*, 204 F.3d 508, 514 (4th Cir. 2000).

This case calls out for a remedy that will deter the government's egregious conduct. The President initiated this prosecution because of his vindictive animus toward Mr. Comey. Intent on retaliating against a perceived political enemy before the statute of limitations expired, the President directed the appointment of a White House aide with no prosecutorial experience as interim U.S. Attorney. Within three days, Ms. Halligan rushed into the grand jury—without the participation of any other prosecutor in the U.S. Attorney's Office—to seek an indictment of Mr. Comey.[6] Her presentation to the grand jury relied on unconstitutionally obtained information and potentially privileged material—some of which had been provided to Agent-3 before his testimony—and featured multiple serious misstatements of law. The grand jury then rejected the indictment. Yet rather than presenting a new indictment to the grand jury, Ms. Halligan signed a new two-count indictment that the grand jury had never seen or voted on. After receiving news of the indictment, the President rejoiced and congratulated Ms. Halligan for successfully carrying out his bidding.

The government has thus committed a series of flagrant legal violations. And the government's misconduct has threatened Mr. Comey's liberty—even though Mr. Comey should be experiencing the peace of an expired statute of limitations. If a dismissal is *without* prejudice, the government will inevitably try to prosecute Mr. Comey again. The only way to deter the government from continuing to pursue this deeply flawed effort to prosecute Mr. Comey is to dismiss with prejudice. That strong remedy will also send a signal to the President and the Department of Justice that the current pattern of politically motivated prosecutions violates bedrock American constitutional principles. The Judiciary is a vital bulwark against this Administration's intolerable abuse of executive power; it should fulfill that role by dismissing this profoundly unjust and unconstitutional prosecution with prejudice.

CONCLUSION

For the foregoing reasons, the indictment should be dismissed with prejudice.

Dated: November 21, 2025 Respectfully submitted,

JAMES B. COMEY, JR.
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of November, 2025, a true copy of the foregoing document was filed electronically through the Court's CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jessica N. Carmichael
Jessica N. Carmichael

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Footnotes

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[1] Mr. Comey respectfully submits that the Court can and should consider this motion along with Mr. Comey's other dispositive motions. ECF Nos. 59, 60, 105. Those motions are fully briefed, and the government has filed its notice concerning *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969). *See* ECF No. 201. The defense requests that the Court direct the government to file its response to this Motion—if any—by November 24, 2025.

[2] While Rule 6(e)(1) states that "the validity of a prosecution is not affected by the *unintentional* failure to make a recording," Fed. R. Crim. P. 6(e)(1) (emphasis added), the violation here would be an intentional decision by a government attorney to communicate with grand jurors without a recorder present.

[3] In fact, it is reasonably possible that—given the late hour—the grand jurors would have already departed for the day if Ms. Halligan had properly sought to convene the grand jury for a vote on the second indictment. Indeed, in the Eastern District of Virginia, standard practice is for the grand jury to depart immediately following the close of deliberations. In that circumstance, the grand jury would have lacked a quorum, and Ms. Halligan would have needed to present the new indictment on a different day—thus creating more time for grand jurors to rethink their prior votes.

[4] Because no indictment has been found within the statute of limitations period, 18 U.S.C. § 3288's tolling provision would not save a future attempt by the government to prosecute Mr. Comey for the alleged offenses here.

[5] Mr. Comey reserves the right to supplement this Motion with further facts and argument if and when the grand jury materials are disclosed to the defense.

[6] In fact, Mr. Comey's counsel requested a meeting with the U.S. Attorney's Office the week before the indictment was obtained and offered to toll the statute of limitations to allow for that meeting. A prosecutor in the Office told Mr. Comey's counsel that the Office had been directed not to engage with defense counsel. Apparently, the President and Ms. Halligan believed that it was more important to "act fast," Kyle Cheney, *'We can't delay any longer': Trump urges Bondi to prosecute his rivals*, Politico (Sept. 20, 2025), https://bit.ly/43L39up, than to conduct an appropriate investigation and thorough process.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,

v.

JAMES B. COMEY, JR.,

Defendant.

Criminal No. 1:25-cr-00272-MSN

OPINION AND ORDER GRANTING MOTION TO DISMISS INDICTMENT (ECF NO. 60)

On September 25, 2025, Lindsey Halligan, a former White House aide with no prior prosecutorial experience, appeared before a federal grand jury in the Eastern District of Virginia. Having been appointed Interim U.S. Attorney by the Attorney General just days before, Ms. Halligan secured a two-count indictment charging former FBI Director James B. Comey, Jr. with making false statements to Congress and obstructing a congressional proceeding.

Mr. Comey now moves to dismiss the indictment on the ground that Ms. Halligan, the sole prosecutor who presented the case to the grand jury, was unlawfully appointed in violation of 28 U.S.C. § 546 and the Constitution's Appointments Clause. As explained below, I agree with Mr. Comey that the Attorney General's attempt to install Ms. Halligan as Interim U.S. Attorney for the Eastern District of Virginia was invalid. And because Ms. Halligan had no lawful authority to present the indictment, I will grant Mr. Comey's motion and dismiss the indictment without prejudice.

I. BACKGROUND

A. Legal Background

"The Appointments Clause prescribes the exclusive means of appointing 'Officers [of the United States].'" *Lucia v. SEC*, 585 U.S. 237, 244 (2018). The text of the Clause contemplates two types of officers: "principal" and "inferior" officers. *See Morrison v. Olson*, 487 U.S. 654, 670–71 (1988). Principal officers must be appointed by the President "with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. The same process "is also the default manner of appointment for inferior officers." *Edmond v. United States*, 520 U.S. 651, 660 (1997). But the Framers "recognized that requiring *all* officers of the Federal Government to run the gauntlet of Presidential nomination and Senate confirmation would prove administratively unworkable." *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 760 (2025) (emphasis in original). "So on one of the last days of the Constitutional Convention[,] . . . they authorized an additional and streamlined method of appointment for inferior officers" in the final provision of the Appointments Clause. *Id.* That provision, "sometimes referred to as the 'Excepting Clause,'" *Edmond*, 520 U.S. at 660, permits Congress to "by Law vest" the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments," U.S. Const. art. II, § 2, cl. 2.

"For United States Attorneys, Congress has preserved the constitutional default rule of Presidential appointment and Senate confirmation."[1] *United States v. Giraud*, __ F. Supp. 3d __, No. 1:24-CR-768, 2025 WL 2416737, at *6 (D.N.J. Aug. 21, 2025) (*Giraud II*), *appeal filed*, No. 25-2635 (3d Cir. Aug. 25, 2025); *see* 28 U.S.C. § 541(a) ("The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district."). Congress has also established a mechanism, set forth in 28 U.S.C. § 546, for appointing interim U.S. Attorneys when a vacancy arises.[2] Section 546 essentially "divide[s] the responsibility for making interim appointments between the Attorney General and the district courts." *United States v. Baldwin*, 541 F. Supp. 2d 1184, 1192 (D.N.M. 2008). It provides in full:

> (a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant.
>
> (b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.
>
> (c) A person appointed as United States attorney under this section may serve until the earlier of—
>
> > (1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or
> >
> > (2) the expiration of 120 days after appointment by the Attorney General under this section.
>
> (d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

28 U.S.C. § 546.

B. Factual Background

On January 20, 2025, Jessica Aber, who had been nominated by President Biden and confirmed by the Senate, resigned from her position as U.S. Attorney for the Eastern District of Virginia.[3] The following day, the Attorney General appointed Erik Siebert as Interim U.S. Attorney under 28 U.S.C. § 546.[4] Mr. Siebert's 120-day interim appointment was set to expire on May 21, 2025. So, on May 9, 2025, the judges of the district exercised their authority under section 546(d) to appoint Mr. Siebert to continue in his role, effective May 21.[5]

On September 19, 2025, Mr. Siebert informed colleagues of his resignation.[6] According to news reports, Mr. Siebert had recently expressed concerns to senior Department of Justice officials about the viability of pursuing charges against Mr. Comey and New York Attorney General Letitia James.[7] Mr. Siebert's resignation came hours after President Trump told reporters at the White House he "want[ed] [Mr. Siebert] out."[8]

The next day, President Trump posted (and later deleted) the following message on social media:

> Pam: I have reviewed over 30 statements and posts saying that, essentially, "same old story as last time, all talk, no action. Nothing is being done. What about Comey, Adam "Shifty" Schiff, Leticia??? They're all guilty as hell, but nothing is going to be done." Then we almost put in a Democrat supported U.S. Attorney, in Virginia, with a really bad Republican past. A Woke RINO, who was never going to do his job. That's why two of the worst Dem Senators PUSHED him so hard. He even lied to the media and said he quit, and that we had no case. No, I fired him, and there is a GREAT CASE, and many lawyers, and legal pundits, say so. Lindsey Halligan is a really good lawyer, and likes you, a lot. We can't delay any longer, it's killing our reputation and credibility. They impeached me twice, and indicted me (5 times!), OVER NOTHING. JUSTICE MUST BE SERVED, NOW!!! President DJT[9]

Less than 48 hours after President Trump's post, on September 22, 2025, the Attorney General issued an order "authorizing Lindsey Halligan to be the Interim United States Attorney for the Eastern District of Virginia during the vacancy in that office" ("September 22 Order"). Att'y Gen. Order No. 6402-2025. The September 22 Order cites only 28 U.S.C. § 546 as the basis for Ms. Halligan's appointment. *Id.*

On September 25, 2025, a grand jury sitting in the Eastern District of Virginia returned a two-count indictment[10] against Mr. Comey, charging him with making false statements within the jurisdiction of the legislative branch, in violation of 18 U.S.C. § 1001(a)(2), and obstructing a congressional proceeding, in violation of 18 U.S.C. § 1505. ECF No. 1. The charges stem from testimony Mr. Comey gave during a Senate Judiciary Committee hearing in 2020. Ms. Halligan was the only prosecutor who participated in the Government's presentation to the grand jury, and only her signature appears on Mr. Comey's indictment. ECF No. 1 at 2.[11]

C. Procedural History

On October 20, 2025, Mr. Comey moved to dismiss the indictment on the ground that Ms. Halligan's appointment was unlawful under section 546 and violated the Appointments Clause. ECF No. 60. On October 21, the Chief Judge of the Fourth Circuit designated me to consider this and any other motion "concerning the appointment, qualification, or disqualification of the United States Attorney or the United States Attorney's Office" in the Eastern District of Virginia. ECF No. 62-1 at 1.

Finding it "necessary to determine the extent of [Ms. Halligan's] involvement in the grand jury proceedings," I ordered the Government on October 28 to submit for in camera review "all documents relating to [Ms. Halligan's] participation" before the grand jury, "along with complete grand jury transcripts." ECF No. 95 at 1. Upon reviewing the transcript provided by the Government, I determined it did not include any remarks made by Ms. Halligan "before and after the testimony of the sole witness." ECF No. 148 at 1. Accordingly, on November 4, I directed the Government to submit "a complete [t]ranscript and/or recording of all statements made by [Ms. Halligan] to the grand jury on September 25, 2025." *Id.* at 1–2. In a notice of compliance filed on November 5, the Government represented it had produced all materials requested by the October 28 and November 4 orders:

> In response [to the October 28 order], the government provided the transcript of the Grand Jury proceedings that was previously provided to the government by the transcription service.
>
> The Court's subsequent [November 4 order] additionally requested the recording from the Grand Jury presentation. Upon receiving this order, the government immediately contacted the transcription service and requested the complete recording.
>
> Further, the government requested that the transcription service transcribe the entire recording, which had not been done previously. This new transcript was provided to the government on November 5, 2025. The above items have now been provided to the Court in compliance with the Court's Orders.

ECF No. 158 at 1–2.

On November 3, the Government responded in opposition to Mr. Comey's motion. ECF No. 137. Also that day, the Government filed an order from the Attorney General dated October 31, 2025 ("October 31 Order"). Att'y Gen. Order No. 6485-2025. The October 31 Order reads in its entirety:

> On September 22, 2025, I exercised the authority vested in the Attorney General by 28 U.S.C. § 546 to designate and appoint Lindsey Halligan as the United States Attorney for the Eastern District of Virginia. *See* Att'y Gen. Order No. 6402-2025. For the avoidance of doubt as to the validity of that appointment, and by virtue of the authority vested in the Attorney General by law, including 28 U.S.C. §[§] 509, 510, and 515, I hereby appoint Ms. Halligan to the additional position of Special Attorney, as of September 22, 2025, and thereby ratify her employment as an attorney of the Department of Justice from that date going forward. As Special Attorney, Ms. Halligan has authority to conduct, in the Eastern District of Virginia, any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before United States Magistrates and Judges. In the alternative, should a court conclude that Ms. Halligan's authority as Special Attorney is limited to particular matters, I hereby delegate to Ms. Halligan authority as Special Attorney to conduct and supervise the prosecutions in *United States v. Comey* (Case No. 1:25-CR-00272) and *United States v. James* (Case No. 2:25-CR-00122).
>
> In addition, based on my review of the grand jury proceedings in *United States v. Comey* and *United States v. James*, I hereby exercise the authority vested in the Attorney General by law, including 28 U.S.C. §[§] 509, 510, and 518(b), to ratify Ms. Halligan's actions before the grand jury and her signature on the indictments returned by the grand jury in each case.

Id.

Mr. Comey filed his reply on November 10.[12] ECF No. 175. On November 13, I heard oral argument from the parties and took the matter under advisement. ECF No. 186. During the hearing, I raised concerns about the Attorney General's ability to review Ms. Halligan's presentation to the grand jury when, as of October 31, the Government had not yet received the complete transcript of the proceeding. ECF No. 189 at 36–37. I also noted that, based on my in camera review, there appeared to be a gap in the grand jury transcript from 4:28 p.m. to 6:47 p.m., when the indictment was returned to the magistrate judge. *Id.* at 36.

The day after the hearing, on November 14, the Government filed an unsworn declaration from Ms. Halligan and a new ratification order from the Attorney General. ECF No. 188. Ms. Halligan declared "that the grand jury transcript accurately reflects the full extent of [her] appearance before the grand jury" and "explain[ed] that the period in question consisted solely of the grand jury's private deliberations." ECF No. 188-1 at 1. She further stated that "[t]here was no additional presentation, interaction, or discussion with the grand jury outside of what is reflected in the transcript."[13] *Id.* at 1–2. For her part, the Attorney General stated she had "reviewed the entirety of the record now available to the government" and again "ratif[ied] Ms. Halligan's actions before the grand jury and her signature on the indictment returned." Att'y Gen. Order No. 6491-2025.

II. DISCUSSION

Resolving Mr. Comey's motion requires me first to decide whether Ms. Halligan was validly appointed as Interim U.S. Attorney under section 546 and the Appointments Clause. If the answer to that question is yes, I need not go any further, and Mr. Comey's motion must be denied. But if the answer is no, and Ms. Halligan had no authority to present Mr. Comey's indictment to the grand jury, then the question becomes, what remedy is appropriate? Should the indictment be dismissed? And if so, should the dismissal be with or without prejudice? I address these issues in turn, beginning with whether Ms. Halligan's appointment was valid under section 546.

A. Ms. Halligan's appointment violated section 546.

According to the Government, this case is "simple." ECF No. 137 at 8. In its view, the "one and only" limitation on the Attorney General's authority to appoint interim U.S. Attorneys under section 546 is subsection (b), which bars the Attorney General from appointing anyone whom the Senate has refused to confirm. *Id.* at 3, 8, 15. "Nothing in the text," it continues, "explicitly or implicitly" precludes the Attorney General from making multiple interim appointments during a vacancy. *Id.* at 8. Thus, it concludes, because "the Senate has not refused advice and consent to Ms. Halligan," the Attorney General "lawfully appointed [her] as interim U.S. Attorney" on September 22. *Id.* at 8.

Mr. Comey counters that section 546 "limits the total tenure of the Attorney General's interim appointments to 120 days" and therefore "precludes an additional appointment by the Attorney General after the expiration of that 120-day period." ECF No. 60 at 16. Accordingly, he argues, Ms. Halligan's appointment was unlawful because the district court possessed the "exclusive authority to appoint an interim U.S. Attorney" once Mr. Siebert's appointment by the Attorney General expired on May 21. *Id.* at 17. Mr. Comey has the better reading of the statute.

"The preeminent canon of statutory interpretation requires [courts] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). "Thus, [my] inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id.* "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Section 546 is unambiguous. Subsection (a) begins by authorizing the Attorney General to "appoint a United States attorney for the district in which the office of United States attorney is vacant." 28 U.S.C. § 546(a). Subsection (c)(2), however, imposes a time limit on appointments made by the Attorney General. It specifies that "[a] person appointed as United States attorney" under the statute "may serve until . . . the expiration of 120 days after appointment by the Attorney General." *Id.* § 546(c)(2). Subsection (d) then provides a single option for how subsequent interim appointments may be made: "If an appointment expires under subsection (c)(2), the district court for such district" — and only the district court — "may appoint a United States attorney to serve until the vacancy is filled." *Id.* § 546(d).

The text and structure of subsection (d) in particular make clear the appointment power (1) shifts to the district court after the 120-day period and (2) does not revert to the Attorney General if a court-appointed U.S. Attorney leaves office before a Senate-confirmed U.S. Attorney is installed. The first word in subsection (d) — "if" — introduces a conditional clause that establishes the condition triggering the district court's authority. *See The Chicago Manual of Style* ¶ 5.235 (18th ed. 2024) ("A conditional clause . . . is an adverbial clause, typically introduced by *if* or *unless* . . . , establishing the condition in a conditional sentence. Usually this is a direct condition, indicating that the main clause . . . is dependent on the condition being fulfilled."). That condition is met once "*an* appointment expires under subsection (c)(2)." 28 U.S.C. § 546(d) (emphasis added). The indefinite article "an" points "to a nonspecific object, thing, or person that is not distinguished from other members of a class," Bryan A. Garner, *Garner's Modern English Usage* 1195 (5th ed. 2022), so the expiration of any single Attorney General appointment satisfies the condition. Thus, if, as here, a court-appointed U.S. Attorney resigns, the district court retains the authority to make another interim appointment because the triggering event — the expiration of "*an* appointment" under subsection (c)(2) — has already occurred. Finally, the conjunction "until" in subsection (d)'s main clause defines the duration of the district court's authority. It lasts from the moment the condition is first met "up to the time that" the vacancy is filled by a Senate-confirmed appointee. *Merriam-Webster's Collegiate Dictionary* 1297 (10th ed. 1997).

This reading is reinforced by the negative-implication canon, which recognizes that the "expression of one thing implies the exclusion of others." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). To be sure, the Supreme Court has cautioned that the "force of any negative implication . . . depends on context," *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013), and that the "canon applies only when circumstances support[] a sensible inference that the term left out must have been meant to be excluded," *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017) (internal quotation marks omitted). Here, however, "the inference is not just sensible but overwhelming." *Johnson v. White*, 989 F.3d 913, 918 (11th Cir. 2021). Congress assigned the authority to appoint interim U.S. Attorneys to different actors in different parts of the same statute: first to the Attorney General in subsection (a), and then to the district court in subsection (d). The omission of the Attorney General in subsection (d), when combined with her inclusion in subsection (a), is strong evidence Congress did not intend for the Attorney General to retain appointment power beyond 120 days. *Cf. United States v. Hilario*, 218 F.3d 19, 23 (1st Cir. 2000) ("The absence of any temporal limit [in subsection (d)] strikes us as deliberate, rather than serendipitous, especially in view of the contrast between adjacent sections of a single statute.").

Adopting the Government's contrary reading would render subsection (d) "insignificant," leaving it to "lie dormant in all but the most unlikely situations." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted); *see id.* ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)); *Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("[C]ourts must give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)). Under the Government's interpretation, Attorney General appointees can "serve indefinitely" "without Senate confirmation" as long as the Attorney General "revisit[s] her interim appointments every 120 days." ECF No. 137 at 9. But if that were correct, the Attorney General could prevent interim appointments from ever "expir[ing] under subsection (c)(2)," which in turn would prevent the district court from ever exercising its appointment power under subsection (d). 28 U.S.C. § 546(d). Such a result would run counter to the principle that courts must avoid interpreting statutes in a way that has the "practical effect" of rendering a provision "entirely superfluous in all but the most unusual circumstances." *TRW Inc.*, 534 U.S. at 29.

The Government's interpretation also conflicts with section 546's statutory history. *See Snyder v. United States*, 603 U.S. 1, 12 (2024) (relying on "statutory history[] [to] reinforce[] [its] textual analysis"); *United States v. Hansen*, 599 U.S. 762, 775 (2023) ("Statutory history is an important part of . . . context."); Scalia & Garner, *supra*, at 440 (defining "statutory history" as the "enacted lineage of a statute, including prior laws, amendments, codifications, and repeals"). From 1986 to 2006, section 546 was identical to its current form.[14] *See* Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 69, 100 Stat. 3592, 3616–17 (1986). But in 2006, Congress amended the statute to abolish "the 120-day limit and the district court's backstopping role" altogether. *Giraud II*, 2025 WL 2416737, at *11; *see* USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, Title V, § 502, 120 Stat. 192, 246 (2006) [hereinafter Reauthorization Act]. This change, which was "inserted quietly into the conference report on the [Reauthorization] Act, without debate," made it possible for "United States Attorneys appointed on an interim basis to serve indefinitely without Senate confirmation." H.R. Rep. No. 110-58, at 5 (2007).

"The switch to an unlimited appointment was short lived," however. *Giraud II*, 2025 WL 2416737, at *11. Just over a year later, "Congress reverted to the pre-[Reauthorization] Act language," reinstating the 120-day limit and the district court's role in the interim appointment process. *Id.*; *see* Preserving United States Attorney Independence Act of 2007, Pub. L. No. 110-34, § 2, 121 Stat. 224 (2007) [hereinafter 2007 Act]. "When Congress amends legislation, courts must presume it intends [the change] to have real and substantial effect." *Ross v. Blake*, 578 U.S. 632, 641–42 (2016) (internal quotation marks omitted). Yet if the Government's reading were correct, the 2007 Act would have had virtually no effect, as it would still allow the Executive to evade the Senate confirmation process indefinitely by stacking successive 120-day appointments.

Undeterred, the Government insists that "in reenacting the pre-2006 text, Congress presumptively ratified the Executive's longstanding use of successive 120-day appointments under [the 1986–2006] version of the statute." ECF No. 137 at 14. True, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, can raise a presumption that the [action] had been [taken] in pursuance of its consent." *Medellín v. Texas*, 552 U.S. 491, 531 (2008) (alterations in original) (internal quotation marks omitted); *see also NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) ("[T]he longstanding practice of the government can inform our determination of what the law is." (internal citation and quotation marks omitted)). But the evidence on which the Government relies — a handful of successive 120-day appointments across the Clinton and Bush administrations — hardly establishes a "longstanding" Executive practice. *Cf. Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) ("Given the fact that the practice goes back over 200 years, and has received congressional acquiescence throughout its history, the conclusion that the President's control of foreign relations includes the settlement of claims is indisputable." (internal quotation marks omitted)). This is especially true when considering the Attorney General had no authority to appoint interim U.S. Attorneys *at all* before 1986.[15] *See* H.R. Rep. No. 110-58, at 4.

Finally, "[f]or those who find it relevant, the legislative history confirms" Congress sought to eliminate the Executive Branch's ability to circumvent the Senate's advice-and-consent role through repeat or indefinite interim appointments. *Honeycutt v. United States*, 581 U.S. 443, 453 (2017). For example, in describing the pre-2006 framework, Senator Leahy explained Congress had "carefully circumscribed [the Attorney General's authority to appoint an interim U.S. Attorney] by limiting it to 120 days, after which the district court would make any further interim appointment needed." 153 Cong. Rec. S1994 (2007) (statement of Sen. Patrick Leahy). The 2007 Act, he stated, would "reinstate th[o]se vital limits on the Attorney General's authority and bring back incentives for [an] administration to fill vacancies with Senate-confirmable nominees." *Id.* Notably, Senator Leahy also rejected the notion that the Attorney General could "use the 120-day appointment authority more than once," stating that the statute "is not designed or intended to be used repeatedly for the same vacancy." *Id.* at S3299.

Senator Feinstein, the 2007 Act's primary sponsor, similarly stated that the legislation "would return the law to what it was before the change that was made in March of 2006." *Id.* at S3298 (statement of Sen. Dianne Feinstein). She explained:

> It would still give the Attorney General the authority to appoint interim U.S. attorneys, *but it would limit that authority to 120 days*. If after that time, the President had not nominated a new U.S. attorney or the Senate had not confirmed a nominee, then the district courts would appoint an interim U.S. attorney.

Id. (emphasis added). Several other Senators echoed this understanding,[16] as did Members of the House of Representatives.[17] And the accompanying House Report explicitly identified "Bypassing the Requirement of Senatorial Advice and Consent" as a primary concern motivating the 2007 Act. H.R. Rep. No. 110-58, at 6.

* * *

In sum, the text, structure, and history of section 546 point to one conclusion: the Attorney General's authority to appoint an interim U.S. Attorney lasts for a total of 120 days from the date she first invokes section 546 after the departure of a Senate-confirmed U.S. Attorney. If the position remains vacant at the end of the 120-day period, the exclusive authority to make further interim appointments under the statute shifts to the district court, where it remains until the President's nominee is confirmed by the Senate.

Ms. Halligan was not appointed in a manner consistent with this framework. The 120-day clock began running with Mr. Siebert's appointment on January 21, 2025. When that clock expired on May 21, 2025, so too did the Attorney General's appointment authority. Consequently, I conclude that the Attorney General's attempt to install Ms. Halligan as Interim U.S. Attorney for the Eastern District of Virginia was invalid and that Ms. Halligan has been unlawfully serving in that role since September 22, 2025.

B. Ms. Halligan's appointment also violated the Appointments Clause.

As discussed, the Appointments Clause allows Congress to "by Law vest" the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., art. II, § 2, cl. 2. Through section 546, Congress devised a statutory scheme that vests the appointment of interim U.S. Attorneys first in "the Head[] of [a] Department[]," and then in "the Courts of Law." *Id.* Because Ms. Halligan was appointed in violation of that scheme, her appointment was not authorized "by Law" and thus also violates the Appointments Clause. *See United States v. Perkins*, 116 U.S. 483, 485 (1886) ("The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.").

Resisting this conclusion, the Government briefly asserts that "not every action 'in excess of … statutory authority is *ipso facto* in violation of the Constitution.'" ECF No. 137 at 25 (quoting *Dalton v. Specter*, 511 U.S. 462, 472 (1994)). That is true but beside the point. "[A]n officer can[not] lawfully exercise the statutory power of [her] office *at all*" unless she has been "properly appointed" under Article II. *Collins v. Yellen*, 594 U.S. 220, 266 (2021) (Thomas, J., concurring) (emphasis added). And here Ms. Halligan has not been appointed (1) by the President with the advice and consent of the Senate or (2) through a process Congress has authorized "by statute." *Kennedy*, 606 U.S. at 804 (Thomas, J., dissenting) ("At the time of the framing, 'by Law' of course meant 'by statute.'" (quoting *Lucia*, 585 U.S. at 254 (Thomas, J., concurring))). So an Appointments Clause violation has occurred. The next question is what to do about that violation.

C. Dismissal of the indictment is appropriate.

The Appointments Clause "is more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659 (internal quotation marks omitted). The Clause not only serves as "a bulwark against one branch aggrandizing its power at the expense of another," *Ryder v. United States*, 515 U.S. 177, 182 (1995), but also "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power," *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991). "Given its importance within our Constitution's structure," *Cody v. Kijakazi*, 48 F.4th 956, 960 (9th Cir. 2022), "'remedies with bite' should be applied to appointments that run afoul of the Clause's restrictions," *Brooks v. Kijakazi*, 60 F.4th 735, 740 (4th Cir. 2023) (quoting *Cody*, 48 F.4th at 960).

Here, Mr. Comey contends Ms. Halligan's unlawful appointment renders all her purported official actions void *ab initio*. ECF No. 60 at 25. He therefore argues the case must be dismissed because Ms. Halligan was not lawfully exercising executive power when she appeared before the grand jury alone and obtained his indictment. *See id.* I agree.

"When an appointment violates the Appointments Clause from the jump, the actor has 'exercise[d] power that [she] did not lawfully possess.'" *United States v. Giraud*, No. 1:24-CR-00768, 2025 WL 2196794, at *8 (D.N.J. Aug. 1, 2025) (*Giraud I*) (alterations in original) (quoting *Collins*, 594 U.S. at 258); *see also Collins*, 594 U.S. at 276 (Gorsuch, J., concurring in part) (explaining that when an officer is "unconstitutionally appointed," "governmental action is taken by someone erroneously claiming the mantle of executive power — and thus taken with no authority at all"); *id.* at 266 (Thomas, J., concurring) ("[A]n officer must be properly appointed before he can legally act as an officer."). In such a case, "the proper remedy is invalidation of the *ultra vires* action[s]" taken by the actor. *United States v. Trump*, 740 F. Supp. 3d 1245, 1302 (S.D. Fla. 2024). "Invalidation 'follows directly from the government actor's lack of authority to take the challenged action in the first place. That is, winning the merits of the constitutional challenge is enough.'" *Id.* (quoting *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 241 (5th Cir. 2022) (Jones, J., concurring)).

In light of these principles, I conclude that all actions flowing from Ms. Halligan's defective appointment, including securing and signing Mr. Comey's indictment, constitute unlawful exercises of executive power and must be set aside. There is simply "no alternative course to cure the unconstitutional problem." *Trump*, 740 F. Supp. 3d at 1303.

The Government attempts to counter this result with several arguments, but none is persuasive.

First, the Government argues that whatever her status as U.S. Attorney, Ms. Halligan still validly obtained and signed Mr. Comey's indictment as an "attorney for the government." ECF No. 137 at 21; *see* Fed. R. Crim. P. 1(b)(1) (defining an "[a]ttorney for the government" as "the Attorney General or an authorized assistant," "a United States attorney or an authorized assistant," or "any other attorney authorized by law to conduct proceedings under these rules as a prosecutor"); Fed. R. Crim. P. 6(d)(1) ("The following persons may be present while the grand jury is in session: attorneys for the government . . . ."); Fed. R. Crim. P. 7(c)(1) ("The indictment . . . must be signed by an attorney for the government."). In support of this argument, the Government relies on the Attorney General's October 31 Order, which purported to retroactively appoint Ms. Halligan to the "additional position" of "Special Attorney," effective September 22, 2025 — three days before Mr. Comey was indicted. Att'y Gen. Order No. 6485-2025. Although the Attorney General has "the power to appoint subordinate officers to assist [her] in the discharge of [her] duties," *United States v. Nixon*, 418 U.S. 683, 694 (1974), the Government has identified no authority allowing the Attorney General to reach back in time and rewrite the terms of a past appointment.

Nor can the variation between the September 22 and October 31 Orders be dismissed as a mere "paperwork error," as suggested by the Government. ECF No. 137 at 28. The September 22 Order was unambiguous. The Attorney General stated she was appointing Ms. Halligan under 28 U.S.C. § 546 to "serve as the United States Attorney for the Eastern District of Virginia . . . for the period of one hundred and twenty days or until replaced in accordance with law, whichever occurs first." Att'y Gen. Order No. 6402-2025. The October 31 Order then purported to appoint Ms. Halligan to an entirely different position (Special Attorney), under entirely different statutes (28 U.S.C. §§ 509, 510, and 515). Att'y Gen. Order No. 6485-2025. I reject the Attorney General's attempt to retroactively confer Special Attorney status on Ms. Halligan. Regardless of what the Attorney General "intended," ECF No. 137 at 23 (emphasis omitted), or "could have" done, *id.* at 28, the fact remains that Ms. Halligan was not an "attorney authorized by law" to conduct grand jury proceedings when she secured Mr. Comey's indictment,[18] Fed. R. Crim. P. 1(b)(1)(D), 6(d)(1).

Second, the Government contends that even if Ms. Halligan lacked the authority to obtain and sign indictments when she appeared before the grand jury, her actions should be entitled to "de facto validity." ECF No. 137 at 24–25 (quoting *Buckley v. Valeo*, 424 U.S. 1, 142 (1976)). When applicable, the de facto officer doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder*, 515 U.S. at 180. "In other words, the doctrine operates so that a defect in an official's appointment is not an adequate ground to challenge his earlier decisions." *Sidak v. U.S. Int'l Trade Comm'n*, 678 F. Supp. 3d 1, 18 (D.D.C. 2023), *appeal filed*, No. 23-5149 (D.C. Cir. June 30, 2023).

But the de facto officer doctrine "applies only to some *non*-constitutional appointments challenges." *Id.* (emphasis in original); *see, e.g.*, *Ball v. United States*, 140 U.S. 118, 128–29 (1891) (applying doctrine where an out-of-district judge assigned to replace a resident judge who had fallen ill continued to hold court after the resident judge's death); *McDowell v. United States*, 159 U.S. 596, 601–02 (1895) (holding that a properly appointed judge assigned to another district was a "judge de facto" and that "his actions as such, so far as they affect[ed] third persons, [were] not open to question," notwithstanding any question as to the validity of his designation). It has no application "when Appointments Clause challenges are involved." *Rop v. Fed. Housing Fin. Agency*, 50 F.4th 562, 587 (6th Cir. 2022) (Thapar, J., concurring in part and dissenting in part); *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015) ("In its most recent cases, . . . the Supreme Court has limited the doctrine, declining to apply it when reviewing Appointments Clause challenges[.]"); *Sidak*, 678 F. Supp. 3d at 17–19.

In *Ryder*, a unanimous Supreme Court declined to apply the de facto officer doctrine to a claim that two judges on a panel of the Coast Guard Court of Military Review had been appointed in violation of the Appointments Clause. 515 U.S. at 179. The Court held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer . . . is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred."[19] *Id.* at 182–83. "Any other rule," it explained, "would create a disincentive to raise Appointments Clause challenges with respect to questionable . . . appointments." *Id.* at 183. "[T]he Court then buried past precedents applying the doctrine," including *Buckley*. *Rop*, 50 F.4th at 587 (Thapar, J., concurring in part and dissenting in part). It declared, "To the extent [those] cases may be thought to have implicitly applied a form of the de facto officer doctrine, we are not inclined to extend them beyond their facts." *Ryder*, 515 U.S. at 184.

"After *Ryder*, the Supreme Court in *Lucia* 'doubled down' on its holding that 'the de facto officer doctrine has no place when Appointments Clause challenges are involved,'" *Sidak*, 678 F. Supp. 3d at 18 (quoting *Rop*, 50 F.4th at 587 (Thapar, J., concurring in part and dissenting in part)), reaffirming that a party who raises a timely Appointments Clause claim is "entitled to relief," *Lucia*, 585 U.S. at 251; *see also id.* at 251 n.5 (explaining that "Appointments Clause remedies are designed" both "to advance [the Clause's structural] purposes directly" and "to create []incentive[s] to raise Appointments Clause challenges" in the first place (internal quotation marks omitted)). Given the Court's holdings in *Ryder* and *Lucia*, the de facto officer doctrine does not bar the relief sought by Mr. Comey.

Third, the Government submits that the grand jury's "independent decision" to indict Mr. Comey renders any error in his indictment harmless. ECF No. 137 at 27–29. The "customary harmless-error inquiry" is normally "applicable where . . . a court is asked to dismiss an indictment prior to the conclusion of the trial." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988). Harmless-error analysis does not apply, however, when "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair." *Id.* at 257. This case presents the unique, if not unprecedented, situation where an unconstitutionally appointed prosecutor, exercising "power [she] did not lawfully possess," *Collins*, 594 U.S. at 258, acted alone in conducting a grand jury proceeding and securing an indictment. In light of the near-complete control that prosecutors wield over the grand-jury process,[20] such an error necessarily "affect[s] the entire framework within which the proceeding occurs," *Greer v. United States*, 593 U.S. 503, 513–14 (2021), and thus "def[ies] analysis by 'harmless-error' standards," *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 812–14 (1987) (plurality opinion) (holding that "harmless-error analysis is inappropriate in reviewing the appointment of an interested prosecutor" in part because "[s]uch an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision").

As a final fallback position, the Government argues that even if Mr. Comey's indictment is flawed, dismissal is inappropriate because the Attorney General has since ratified Ms. Halligan's actions before the grand jury and her signature on the indictment. ECF No. 137 at 29–30; *see* Att'y Gen. Order Nos. 6485-2025, 6491-2025. Even assuming the agency-law doctrine of ratification can be used to cure a defective indictment (the Government cites no authority holding as much), the Attorney General's attempt at ratification here fails.

"Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account . . . ." Restatement (Second) of Agency § 82 (1958). In effect, the doctrine "reaches back and makes it so that a formerly unauthorized act was authorized from the get-go." *Wille v. Lutnick*, __ F.4th __, 2025 WL 3039191, at *8 (4th Cir. Oct. 31, 2025). But for ratification to be effective, "the principal must have [had] the authority to authorize the action *both* when the action [was] initially performed by the agent, *and* when the act [was] affirmed (and thereby ratified) by the principal." *Id.* (emphasis in original). The Attorney General lacked that authority at both points here.

I have already concluded that Ms. Halligan's original appointment was invalid and that the Attorney General's attempt to retroactively bestow Special Attorney status on her was ineffective. As a result, the Attorney General "could not have authorized" Ms. Halligan, who was not an attorney for the Government at the time, to present Mr. Comey's indictment to the grand jury on September 25. Restatement (Second) of Agency, *supra*, § 84(2) (stating that if "the purported or intended principal could not have authorized" the challenged "act" when it was "done," "he cannot ratify" it). The implications of a contrary conclusion are extraordinary. It would mean the Government could send any private citizen off the street — attorney or not — into the grand jury room to secure an indictment so long as the Attorney General gives her approval after the fact. That cannot be the law.

The Government also fails to meet the second requirement for a valid ratification, i.e., that the principal must have been able "to do the act ratified . . . *at the time the ratification was made*." *FEC v. NRA Pol. Victory Fund*, 513 U.S. 88, 98 (1994) (emphasis in original) (internal quotation marks omitted). In *NRA Political Victory Fund*, the Supreme Court rejected the Solicitor General's attempt to ratify the filing of an unauthorized petition for certiorari when the attempted ratification occurred after the filing deadline had already passed. *Id.* at 98. Similarly here, the Attorney General's attempt to ratify Mr. Comey's indictment on October 31 "came too late in the day to be effective," as the statute of limitations for the charged offenses expired 31 days earlier on September 30.[21] *Id.*

The Government responds that the Attorney General's ratification was proper because she could have "personally obtain[ed] a new indictment" on October 31 "using [the] grace period" set forth in 18 U.S.C. § 3288. ECF No. 137 at 29. That statute provides in part:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information.

18 U.S.C. § 3288. "[B]y its own terms," section 3288 "only applies where an indictment has previously been dismissed." *United States v. Crysopt Corp.*, 781 F. Supp. 375, 377 (D. Md. 1991). But on October 31, Mr. Comey's indictment remained pending. Thus, the Attorney General could not have invoked section 3288 "*at the time the ratification was made*." *NRA Political Victory Fund*, 513 U.S. at 98 (emphasis in original) (internal quotation marks omitted).

D. Dismissal will be without prejudice.

Having found that Ms. Halligan's appointment violated 28 U.S.C. § 546 and the Appointments Clause and that dismissal of Mr. Comey's indictment is warranted, the remaining issue is whether dismissal should be with or without prejudice. Relying primarily on the Ninth Circuit's decision in *United States v. Bundy*, 968 F.3d 1019 (9th Cir. 2020), Mr. Comey urges me to exercise my supervisory powers and dismiss his indictment with prejudice. ECF No. 60 at 29–32. A with-prejudice dismissal is necessary, he argues, to "vindicate the interests protected by the Appointments Clause" and to "deter the government from using unlawful appointments to effectuate retaliation against perceived political opponents." *Id.* at 29; *see United States v. Hasting*, 461 U.S. 499, 505 (1983) (recognizing that a court may use its "supervisory powers" to "implement a remedy for violation of recognized rights" and "as a remedy designed to deter illegal conduct"). The Government, on the other hand, asserts that any dismissal should be without prejudice, for Mr. Comey "comes nowhere close to showing 'flagrant misbehavior,' 'substantial prejudice,' or the unavailability of a 'lesser sanction,'" as required by *Bundy*. ECF No. 137 at 31; *see Bundy*, 968 F.3d at 1031 (holding that a "district court may dismiss an indictment with prejudice for prosecutorial misconduct" using its "supervisory powers" only if there is "flagrant misbehavior," "substantial prejudice," and "no lesser remedial action" available).

Ultimately, I believe the Supreme Court's Appointments Clause jurisprudence provides the answer to the with-or-without-prejudice question. In both *Ryder* and *Lucia*, the Court essentially unwound the actions taken by the unconstitutionally appointed officer and restored the affected party to the position the party occupied before being subjected to those invalid acts. *See Ryder*, 515 U.S. at 188 (ordering a new "hearing before a properly appointed panel"); *Lucia*, 585 U.S. at 251 ("[T]he 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." (quoting *Ryder*, 515 U.S. at 183, 188)); *see also Nguyen v. United States*, 539 U.S. 69, 83 (2003) (vacating decisions made by an appeals panel that included a judge who was ineligible to sit by designation on an Article III court and remanding "for fresh consideration of petitioners' appeals by a properly constituted panel"). I will do the same here. I will invalidate the *ultra vires* acts performed by Ms. Halligan and dismiss the indictment without prejudice, returning Mr. Comey to the status he occupied before being indicted. *See Trump*, 740 F. Supp. 3d at 1303, 1309.

III. CONCLUSION

For the reasons set forth above, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The appointment of Ms. Halligan as Interim U.S. Attorney violated 28 U.S.C. § 546 and the Appointments Clause of the U.S. Constitution.
2. All actions flowing from Ms. Halligan's defective appointment, including securing and signing Mr. Comey's indictment, were unlawful exercises of executive power and are hereby set aside.
3. The Attorney General's attempts to ratify Ms. Halligan's actions were ineffective and are hereby set aside.
4. Mr. Comey's motion to dismiss the indictment (ECF No. 60) is granted in accordance with this order.
5. The indictment is dismissed without prejudice.
6. The power to appoint an interim U.S. Attorney for the Eastern District of Virginia pursuant to 28 U.S.C. § 546 during the current vacancy lies with the district court until a U.S. Attorney is nominated by the President and confirmed by the Senate under 28 U.S.C. § 541.

IT IS SO ORDERED.

s/Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
Senior United States District Judge
Sitting by Designation

Columbia, South Carolina
November 24, 2025

Footnotes

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[1] The parties agree that U.S. Attorneys are inferior officers. ECF No. 60 at 9; ECF No. 137 at 5.

[2] Another statute, the Federal Vacancies Reform Act of 1998 ("FVRA"), 5 U.S.C. §§ 3345–3349d, allows the President to "direct certain officials to temporarily carry out the duties of a vacant [office requiring Presidential appointment and Senate confirmation] in an acting capacity." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 293 (2017). The FVRA is not at issue in this case.

[3] Press Release, United States Attorney's Office, Eastern District of Virginia, *U.S. Attorney Jessica D. Aber Announces Resignation* (Jan. 17, 2025), https://www.justice.gov/usao-edva/pr/us-attorney-jessica-d-aber-announces-resignation.

[4] Press Release, United States Attorney's Office, Eastern District of Virginia, *Erik Siebert Appointed Interim U.S. Attorney for the Eastern District of Virginia* (Jan. 21, 2025), https://www.justice.gov/usao-edva/pr/erik-siebert-appointed-interim-us-attorney-eastern-district-virginia.

[5] United States District Court for the Eastern District of Virginia, *Appointment of Erik S. Siebert as Interim U.S. Attorney Effective May 21, 2025* (May 9, 2025), https://www.vaed.uscourts.gov/news/appointment-erik-s-siebert-interim-us-attorney-effective-may-21-2025.

[6] Glenn Thrush et al., *U.S. Attorney Investigating Two Trump Foes Departs Amid Pressure from President*, N.Y. Times (Sept. 19, 2025), https://www.nytimes.com/2025/09/19/us/politics/erik-siebert-comey-letitia-james.html.

[7] *Id.*; Salvador Rizzo, Perry Stein & Jeremy Roebuck, *Top Virginia Prosecutor Resigns Amid Criticism over Letitia James Investigation*, Wash. Post (Sept. 20, 2025), https://www.washingtonpost.com/national-security/2025/09/19/trump-letitia-james-erik-siebert-virginia/; The Associated Press, *U.S. Attorney Resigns Under Pressure From Trump to Charge N.Y. AG Letitia James*, NPR (Sept. 20, 2025), https://www.npr.org/2025/09/20/nx-s1-5547837/us-attorney-virginia-resigns-letitia-james-probe.

[8] Thrush et al., *supra* note 6.

[9] Donald J. Trump (@realDonaldTrump), Truth Social (Sept. 20, 2025, at 18:44 ET), https://truthsocial.com/@realDonaldTrump/posts/115239044548033727.

[10] The grand jury was originally presented with a three-count indictment. ECF Nos. 3, 10. At some point, however, a second, two-count indictment was prepared (it is unclear by whom), which removed Count One of the original indictment. ECF No. 10 at 4–5. Both indictments were signed by Ms. Halligan and the grand jury foreperson and were returned to the magistrate judge. *Id.* at 4–5; ECF No. 1 at 2; ECF No. 3 at 4. During the indictment return proceeding, the foreperson explained that the grand jury "did not agree on" the "very first count" and that "Count[s] Two and Three were then put in a different package, which we agreed on." ECF No. 10 at 4. After speaking with Ms. Halligan, the magistrate judge accepted the return of the second, two-count indictment and instructed the foreperson to annotate the "Report of a Grand Jury's Failure to Concur in an Indictment" to reflect that it applied only to Count One. *Id.* at 6.

[11] Citations to page numbers are to those generated by CM/ECF.

[12] In addition to the parties' briefs, I have also considered two amicus briefs, one from a bipartisan group of current and former members of Congress, ECF No. 87-2, and the other from a bipartisan group of former federal judges and U.S. Attorneys, ECF No. 92-2.

[13] In a motion filed on November 21, Mr. Comey argues the case should be dismissed because the operative two-count indictment was never presented to the full grand jury. ECF No. 211. The issues raised in Mr. Comey's November 21 motion are not before me.

[14] Three days after Congress enacted the 1986 law, an Office of Legal Counsel ("OLC") memorandum authored by then-Deputy Assistant Attorney General Samuel Alito concluded the statute does not allow "the Attorney General [to] make another appointment pursuant to [subsection (a)] after the expiration of the 120-day period." Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att'y Gen., Off. of Legal Couns., to William P. Tyson, Dir., Exec. Off. for U.S. Att'ys 3 (Nov. 13, 1986), available at https://perma.cc/SD5Q-7CPH. "The statutory plan," Alito reasoned, "discloses a Congressional purpose that after the expiration of the 120-day period further interim appointments are to be made by the court rather than by the Attorney General." *Id.* Footnote Continued . . .

Though not binding, OLC's "contemporaneous[]" interpretation of section 546 further supports Mr. Comey's position. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386, 388 (2024).

[15] By contrast, the judiciary's authority to make interim appointments dates back to the Civil War. *See* Act of March 3, 1863, ch. 93, § 2, 12 Stat. 768 (1863).

[16] 153 Cong. Rec. S3240 (2007) (statement of Sen. Harry Reid) (remarking that the 2007 Act would "restore[] the pre-[Reauthorization] Act procedure," which "allowed the chief Federal judge in the Federal district court to appoint a temporary replacement while the permanent nominee undergoes Senate confirmation"); *id.* at S3245 (statement of Sen. Arlen Specter) ("I think there is no doubt we ought to . . . go back to the old system where the Attorney General could appoint for 120 days, on an interim basis, and then after that period of time the replacement U.S. attorney would be appointed by the district court."); *id.* at S3255 (statement of Sen. Ted Kennedy) ("The bill before us . . . reinstates the 120-day limit on service by interim U.S. attorneys appointed by the Attorney General. This change will force the administration to send nominees to the Senate to fill vacant slots, or have them filled by a court instead."); *id.* at S3304 (statement of Sen. Carl Levin) ("The legislation before us today is simple: it would repeal [the] changes [in the Reauthorization Act] . . . and would require an interim appointment made by the Attorney General to expire after 120 days or when a successor is nominated by the President and confirmed by the Senate, whichever comes first. If at the end of the 120-day period no successor has been confirmed, the relevant district court would be authorized to appoint an interim U.S. attorney to serve until the vacancy is filled.").

[17] 153 Cong. Rec. H5553 (2007) (statement of Rep. John Conyers) ("[W]hat this measure does is restore the checks and balances that have historically provided a critical safeguard against politicization of the Department of Justice and the United States attorneys, limiting the Attorney General's interim appointments to 120 days only, then allowing the district court for that district to appoint a U.S. attorney until the vacancy is filled[.]"); *id.* at H5554 (statement of Rep. Ric Keller) ("S. 214 returns the authority of the judiciary to appoint interim U.S. attorneys if a permanent replacement is not confirmed within 120 days."); *id.* at H5555 (statement of Rep. Sheila Jackson Lee) ("This much needed and timely legislation . . . restore[s] the 120-day limit on the term of a United States Attorney appointed on an interim basis by the Attorney General.").

[18] The Government attempts to frame the effect of Ms. Halligan's invalid appointment as nothing more than a violation of Rule 7's signature requirement. *See* ECF No. 137 at 23–24. The Government is correct that courts have treated "the improper signing of an indictment," *Wheatley v. United States*, 159 F.2d 599, 601 (4th Cir. 1946), as a "technical deficienc[y]" that does not always require dismissal, *United States v. Irorere*, 228 F.3d 816, 830–31 (7th Cir. 2000); *see also* 1 *Wright & Miller's Federal Practice & Procedure* § 124 (5th ed. 2025) (observing that "courts have not rigorously enforced" Rule 7's signature requirement). The problem here, though, is not just Ms. Halligan's signature on the indictment — she presented the indictment to the grand jury alone, without being a "proper representative of the Government." *United States v. Garcia-Andrade*, No. 13-CR-993-IEG, 2013 WL 4027859, at *9 (S.D. Cal. Aug. 6, 2013).

[19] Although *Ryder* concerned the appointment of adjudicators, "[t]here is no reason to limit the permissive approach to Appointments Clause claims and remedies where a defendant challenges the appointment of the party bringing criminal charges against him, as opposed to the party adjudicating the case." *Giraud I*, 2025 WL 2196794, at *7. "The same 'structural' interests are at stake, because the allegation is that one branch has attempted to 'aggrandiz[e] its power at the expense of another branch' and thereby 'diffus[e] the appointment power.'" *Id.* (quoting *Freytag*, 501 U.S. at 878).

[20] Although the grand jury is understood to be "a constitutional fixture in its own right," *United States v. Williams*, 504 U.S. 36, 47 (1992) (internal quotation marks omitted), it is "easy to overstate the grand jury's independence from the prosecutor," 1 *Wright & Miller's Federal Practice & Procedure* § 102 (5th ed. 2025). Indeed, it is the prosecutor "who decides which investigations to pursue, what documents to subpoena, which witnesses to call, and what charges to recommend for indictment." 1 *Wright & Miller*, *supra*, § 102. And it is the prosecutor who examines the witnesses, summarizes the evidence, and advises the grand jury on the law.

[21] Generally, "[t]he return of an indictment tolls the statute of limitations on the charges contained in the indictment." *United States v. Ojedokun*, 16 F.4th 1091, 1109 (4th Cir. 2021). "An *invalid* indictment," however, "cannot serve to block the door of limitations as it swings closed." *United States v. Crysopt Corp.*, 781 F. Supp. 375, 378 (D. Md. 1991) (emphasis in original); *see also United States v. Gillespie*, 666 F. Supp. 1137, 1141 (N.D. Ill. 1987) ("[A] *valid* indictment insulates from statute-of-limitations problems any refiling of the same charges during the pendency of that valid indictment (that is, the superseding of a valid indictment). But if the earlier indictment is *void*, there is no legitimate peg on which to hang such a judicial limitations-tolling result." (emphasis in original)).